Authorized - ~~for~~ Division of opinion

Submitted 2-289 Judge Davis.

Jany

27th

not authorized

Jus Strong

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 710.

THE TOWN OF ELMWOOD, PLAINTIFF IN ERROR,

VS.

GEORGE O. MARCY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 14, 1875.

Riley v Silliman 62. Ill. 170.

Marshall v Silliman 61. " 218

Certificate of division -

p 38 - 9 brief -

p 13 -

18

Cen

2ve

T

—

18

Ceul

2vel

—

SUPREME COURT OF THE UNITED STATES.

No. 710.

THE TOWN OF ELMWOOD, PLAINTIFF IN ERROR,

vs.

GEORGE O. MARCY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Precipe	2	1
Bond for costs	2	1
Summons	3	2
Declaration	5	2
Plea	12	6
Similiter	14	6
Trial and judgment	15	6
Deposition of George O. Marcy	16	7
James H. Beveridge	20	8
Motion to vacate judgment	22	9
New trial and judgment	22	9
Certificate of division of judges	24	10
Bond for costs	43	15
Clerk' certificate	45	15
Writ of error	46	16
Citation	48	16
Assignment of errors	50	17

SUPREME COURT OF THE UNITED STATES.

No. 710.

THE TOWN OF ELMWOOD, PLAINTIFF IN ERROR,

VS.

GEORGE O. MARCY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Precipe	2	1
Bond for costs	2	1
Summons	3	2
Declaration	5	2
Plea	12	6
Similiter	14	6
Trial and judgment	15	6
Deposition of George O. Marcy	16	7
James H. Beveridge	20	8
Motion to vacate judgment	22	9
New trial and judgment	22	9
Certificate of division of judges	24	10
Bond for costs	43	15
Clerk' certificate	45	15
Writ of error	46	16
Citation	48	16
Assignment of errors	50	17

1

Ce

2v

1 Pleas in the circuit court of the United States for the northern district of Illinois, begun and held at the city of Chicago, on Monday, the fifth day of July, in the year of our Lord one thousand eight hundred and seventy-five, before the Hon. Thomas Drummond, circuit judge, and the Hon. Henry W. Blodgett, district judge, and on Wednesday, the twenty-eighth day of July, one thousand eight hundred and seventy-five, and of our Independence the 100th year.

WM. H. BRADLEY, *Clk.*

GEORGE O. MARCY
vs.
THE TOWN OF ELMWOOD. } Assumpsit.

Be it remembered that on the 11th day of February, A. D. 1875, the said plaintiff, by Wilson and Perry, his attorneys, came into the clerk's office of said court and filed his precipe for summons, and also bond for costs against said defendant, which said præcipe and bond for costs reads in the words and figures following, to wit:

2 Circuit court of the United States, northern district of Illinois.

GEORGE O. MARCY
v.
TOWN OF ELMWOOD. } Assumpsit.

Clerk will please issue a summons in the above-entitled suit in a plea of trespass on the case upon promises, directed to the marshal*l* of said district and returnable to the March term of said court, 1875. Damages, $5,000.

Chicago, Feb. 11, 1875.

WILSON AND PERRY,
Plff.'s Attys.

(Endorsed:) Filed Feb'y 11, 1875. Wm. H. Bradley, clerk.

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, March term, A. D. 1875.

GEORGE O. MARCY
vs.
TOWN OF ELMWOOD. } In assumpsit.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him hereby agree and stipulate that execution may issue against our property for any costs taxed against him. Dated this 11th day of February, A. D. 1875.

WILSON & PERRY.

(Endorsed:) Filed Feb'y 11th, A. D. 1875. Wm. H. Bradley, clk.

3 And thereupon a summons issued out of said clerk's office, which together with the marshal's return, reads in the words & figures following, to wit:

Circuit court of the United States of America, northern district of Illinois.

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon Town of Elmwood if found in your district to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of March next, to answer unto George O. Marcy of a plea of trespass on the case upon promises to his damage, as he alleges, of five thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this eleventh day of February, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the 99th year.

[L. S.]

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

4 Know all men by these presents that I have appointed, and by these presents do appoint, Stephen Adams my true and lawful deputy, to execute the annexed writ, Geo. O. Marcy vs. Town of Elmwood, and to make return of the execution thereof according to law.

B. H. CAMPBELL, [SEAL.]
United States Marshal for the Northern District of Illinois.

☞I have served this writ on the Town of Elmwood by reading the same to and delivering a true copy thereof to William H. Kellogg, supervisor of the said Town of Elmwood, this the 20th day of February, A. D. 1875.

B. H. CAMPBELL,
United States Marshal,
By STEPHEN ADAMS,
Special Deputy.

Stephen Adams, being duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense returned by him in addition to the fees was actually incurred, and that the same was according to law.

Sworn to before me this twentieth day of February, A. D. 1875.

(Endorsed:) Filed Feb. 26, 1875. W. H. Bradley, clerk.

And afterwards, to wit, on the 19th day of Feb., A. D. 1875, the said plaintiff by his attorneys filed his declaration against said defendant in the words and figures following, to wit: 5

UNITED STATES OF AMERICA:

Circuit court of the United States, northern district of Illinois. March term, A. D. 1875.

GEORGE O. MARCY
vs.
TOWN OF ELMWOOD.

George O. Marcy, a citizen of the State of Massachusetts, plaintiff in

this suit, by Wilson and Perry, his attorneys, complains of Town of Elmwood, a municipal corporation organized and existing under and by virtue of the township organization laws of the State of Illinois, at and within the county of Peoria, in said State of Illinois, to wit, at and within said northern district of Illinois, defendant in this suit, being summoned, &c., in a plea of trespass on the case upon promises, for that heretofore, to wit, on the 27th day of April, A. D. 1869, at said Town of Elmwood, to wit, at and within said northern district of Illinois, the said defendant, by the name and style of the Township of Elmwood, by its duly authorized officers and agents, and in pursuance of the then existing laws of said State of Illinois, made, executed, and delivered, to the Dixon, Peoria and Hannibal Railroad Company, an incorporated company, existing under and by virtue of the laws of the State of Illinois, its certain evidence of indebtedness, commonly called town-bonds, signed by L. F. Jones, the supervisor, and Samuel M. Farrar, the town clerk of said town of Elmwood, and then and there, in and by each of said evidences of indebtedness, acknowledged itself
6 by the name and style of Township of Elmwood, to owe and be indebted to the bearer thereof in the sum of one thousand dollars, which said sum the said defendant, by the name and style aforesaid, thereby then and there promised to pay to the bearer of said bonds on the first day of July, A. D. 1889, with interest thereon at the rate of ten per cent. per annum, payable annually on the first day of July in each year, at the office of the State treasurer of said State of Illinois, at Springfield, on the presentation and surrender of the interest-warrants annexed to said bonds, in each of which said bonds or evidences of indebtedness it was recited that such bond was issued under and by virtue of a law of the State of Illinois, entitled "An act to incorporate the Dixon, Peoria and Hannibal Railroad Company," approved March 5th, 1869, and amended and approved March 9th, 1869; and also in virtue of an act entitled "An act to legalize a certain election therein named," approved April 17th, 1869, and authorizing the several townships, cities, and incorporated towns in the counties through which the road may be located to subscribe and take stock in the Dixon, Peoria and Hannibal Railroad Company to an amount not exceeding one hundred thousand dollars to each township, city, or incorporated town, and to pay for the same in the bonds of said township, city, or town maturing twenty years from the date of their issue, and bearing interest at *at* a rate not exceeding ten per cent. per annum, payable annually, and in accordance with the vote of the electors of said township at the special election held March 16, A. D. 1869,
7 in accordance with the provisions of said act, to each of which said bonds were annexed certain written interest-warrants, commonly called coupons, subscribed by said supervisor by the name of L. F. Jones, supervisor, and by said town clerk by the name of S. M. Farrar, respectively, ordering and directing the supervisor of said town to pay to the bearer of said coupons on the first day of July in the respective years when the same should be payable, according to the tenor of said coupons respectively, one hundred dollars at said State treasurer's office, being the annual interest for the year ending on that day, each of said interest-warrants bearing a number corresponding to the number of the bonds to which they were respectively annexed, which said bonds, with said coupons annexed, were, after their execution and delivery to said railroad company as aforesaid, and before their maturity, to wit, on the 27th day of April, 1869, to wit, at Boston, in said State of Massachusetts, sold, transferred, and delivered by said railroad

company for value to bona-fide purchasers, who thereby became the bearers and owners thereof; that afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, a large number of said coupons, being the coupons hereinafter described, were detached from said bonds, and were purchased by and transferred to said plaintiff from said last-named purchaser for value, and said plaintiff thereby became, and from thence hitherto has been and still is, the bearer and owner of said coupons; that thirty of said coupons so purchased and transferred to said plaintiff are in the words and
8 figures (except the numbers) following, namely:

$100. Elmwood Township railroad bond. **No.——**

INTEREST-WARRANT.

Supervisor of Elmwood Township, Peoria County, Illinois, pay to bearer July 1st, 1872, one hundred dollars, at the office of the State treasurer, Springfield, Illnois.

L. F. JONES, *Supervisor.*
S. M. FARRAR, *Clerk.*

Which said coupons are numbered, respectively, as follows: **36, 37, 38, 39, 40, 41, 42, 43, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75.** That two of said coupons so purchased and transferred to said plaintiff, are in the words and figures (except the numbers) following, namely:

$100. Elmwood Township railroad bond. No. ——

INTEREST-WARRANT.

Supervisor of Elmwood Township, Peoria County, Illinois, pay to bearer July 1st, 1873, one hundred dollars, at the office of the State treasurer, Springfield, Illinois.

L. T. JONES, *Supervisor.*
S. M. FARRAR, *Clerk.*

Which said last two coupons are numbered, respectively, as follows: 37, 38. That four of said coupons so sold and transferred to said plaintiff are in the words and figures following (except the numbers,) namely:

$100. Elmwood Township railroad bond. No. ——

INTEREST-WARRANT.

Supervisor of Elmwood Township, Peoria County, Illinois, pay to bearer July 1st, 1874, one hundred dollars, at the office of the State treasurer, Springfield, Illinois.

L. F. JONES, *Supervisor.*
S. M. FARRAR, *Clerk.*

Which said last coupons are numbered, respectively, as follows:
9 71, 73, 74, 75, whereby, and by means of the premises aforesaid, the said defendant, the said Town of Elmwood, became liable to pay to said plaintiff the several sums in each of said coupons as above specified, amounting in all to a large sum, to wit, the sum of thirty-six

hundred dollars, and in consideration thereof, then and there, to wit, on said 27th day of April, 1869, to wit, at and within said northern district of Illinois, undertook and promised by the name and style of the Township of Elmwood, to pay said plaintiff the same at the several times and according to the tenor and effect of said coupons, which times have severally elapsed, yet the said defendant, though requested, and though each of said coupons was duly presented for payment at the place in said coupons specified, and payment thereof demanded, of all which the defendant had notice, has not paid the same nor any part thereof, but so to do has wholly neglected and refused. And whereas, also, the said defendant heretofore, to wit, on the first day of February, A. D. 1875, at Elmwood, to wit, at and within said northern district of Illinois, became and was indebted to the plaintiff in the sum of five thousand dollars, for money then lent by the plaintiff to the said defendant at its request; and in the sum of five thousand dollars for money then paid by the plaintiff for the use of said defendant at its request; and in the sum of five thousand dollars for money then received by said
defendant for the use of the plaintiff; and in the sum of five
10 thousand dollars for money found to be due from said defend-
ant to the plaintiff upon an account then stated between them;
and in the sum of five thousand dollars for interest then due and owing to the plaintiff from said defendant on the coupons in the first count mentioned, accrueing after their maturity, and in consideration thereof then and there promised the plaintiff to pay him the several monies last aforesaid upon demand. Yet the said defendant has never paid any of said moneys, but wholly neglects and refuses so to do.

By means of which said several premises the plaintiff has sustained damage to the amount of five thousand dollars, and therefore brings suit, &c.

By WILSON & PERRY,
His Attorneys.

The plaintiff's only cause of action is the thirty-six interest-warrants or coupons for $100 each, particularly set forth in the first count of the declaration, thirty due July 1st, 1872, and numbered respectively 36, 37, 38, 39, 40, 41, 42, 43, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75.

Two of said coupons due July 1, 1873, and numbered, respectively, 37, 38.

Four of said coupons due July 1, 1874, and numbered, respectively, 71, 73, 74, 75.

11 *Town of Elmwood to George O. Marcy, Dr.*

To money lent	$5,000
" money had and received	5,000
" money paid	5,000
" money due on account stated	5,000
" interest	5,000

(Endorsed:) Filed Feb'y 19, 1875. Wm. H. Bradley, clk.

12 And afterwards, to wit, on the 18th day of May, 1875, the said
defendant, by Johnson & Hopkins, its attorney, came and filed
their plea herein, which is in the words & figures following, to wit:

Plea.

Circuit court United States, northern district of Illinois.

GEORGE O. MARCY
vs.
THE TOWN OF ELMWOOD.

Notice is hereby given to the said plaintiff that under a plea of general issue filed in said cause, the said defendant will, in addition to the facts already stated in the notice accompanying the said plea of the general issue, give in evidence, upon the trial of said cause, the further fact, to wit, that all the bonds for the payment of the interest upon which the coupons named in the plaintiff's declaration were given and executed, as well as the coupons themselves, have been adjudged 13 and adjudicated to be null and void by the supreme court of the State of Illinois, in a direct proceeding upon the same.

E. G. JOHNSON AND
H. B. HOPKINS,
Attorneys for Defendant.

(Endorsed:) Filed May 18, 1875. Wm. H. Bradley, clk.

14 And thereupon on the same day, the said plaintiff files his similitar to the plea of the said defendant, which reads in the words & figures following, to wit:

Similitar.

Circuit court of the United States, northern district of Illinois.

GEORGE O. MARCY
vs. No. 746. Assumpsit.
TOWN OF ELMWOOD.

And the said plaintiff as to the plea of the said defendant, wherein it puts itself upon the country, doth the like.

By WILSON & PERRY,
His Attys.

(Endorsed:) Filed May 18, 1875. W. H. Bradley, cl'k.

15 And afterwards, to wit, on the 9th day of July, 1875, in the record of the proceedings of said court in said cause is the following entry, to wit:

GEORGE O. MARCY
vs. Assumpsit.
TOWN OF ELMWOOD.

This cause having this day been called for trial, now comes the plaintiff by his attorney and moves the court that a jury come to try the issue found upon the plea of the defendant filed herein. It is thereupon considered by the court that a jury come to try said issue, and thereupon come a jury of good and lawfull men, to wit, A. J. Hodges, William Osborne, Gilbert Thayer, R. Whitely, J. P. Elliott, J. G. True, W. P. Larkin, Charles Tollman, J. S. Bartlett, J. W. Mayhew, John Harrington, and R. V. Kennedy, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing the evidence on the part of the plaintiff and receiving the instructions of the court, the jury returned the following verdict, to wit: We, the jury, find the issue for the plaintiff, and assess his damages to the sum four thousand one hundred and ninety-two dollars and ninety cents. It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of four thousand one hundred and ninety-two dollars and ninety cents, his damages so as aforesaid assessed, together with his costs and charges in this behalf expended, amounting to the sum dollars and cents.

16 Depositions read & produced in the hearing of said cause, read in the words & figures following, to wit:

Deposition.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

On the ninth day of June, 1875, George O. Marcy personally appeared before me, a notary public for said county, duly commissioned and qualified, and he being first by me duly cautioned and sworn to speak the truth, the whole truth, and nothing but the truth, relating to the cause for which his deposition is taken, gave the following deposition, which was by me reduced to writing in his presence, and then by me carefully read to him in his presence and hearing, and then by him subscribed in my presence.

17 Taken at the request of the plaintiff and to be used in an action of assumpsit now pending between him and Town of Elmwood, before the circuit court of the U. S. for the northern district of Illinois, and the adverse party was duly notified as appears by the copy notice hereto annexed, and was not present.

The reason for taking said deposition is that the deponent resides without the jurisdiction of said circuit court.

Witness my hand and official seal.

[SEAL.] A. G. FISHER,
Notary Public.

GEORGE O. MARCY, being duly sworn, on his oath, deposes and says:

18 My name is George O. Marcy; I reside in Boston, in the State of Massachusetts, and am the plaintiff in a suit commenced in the circuit court of the United States for the northern district of Illinois against the Town of Elmwood, and I was the owner of the thirty six interest-warrants or coupons mentioned and described in the plaintiff's declaration at the time of the commencing said suit. I purchased all of said coupons before their maturity in the city of Boston, in the open market, and in the usual course of my business, which was then that of a dealer in municipal bonds, and paid for them one hundred cents on the dollar, or about that price. Thirty of said coupons matured July 1st, 1872, and are numbered as follows, respectively: 36, 37, 38, 39, 40, 41, 42, 43, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75. *Two* of said coupons matured July 1st, 1874, and are number' as follows: 71, 73, 74, 75. At the time I purchased said coupons, I had no knowledge or information of any defence to them; on the contrary, I purchased them in good faith, believing them to be valid obligations against said Town of Elmwood. They were cut from bonds of

the Town of Elmwood, being the same bonds referred to in the plaintiff's declaration, and the numbers of the coupons corresponded with the numbers of the bonds from which they were cut.

GEO. O. MARCY.

Massachusetts, Suffolk, 9 June, 1875.

Subscribed and sworn to before me.
[SEAL.]

A. G. FISHER,
Notary Public.

19 Circuit court of the United States for the northern district of Illinois.

GEORGE O. MARCY
vs.
THE TOWN OF ELMWOOD.
} Assumpsit.

To H. B. HOPKINS, Esq., *Attorney for said Defendant:*

SIR: Please take notice that on Wednesday, the 9th day of June, A. D. 1875, at the office of Robert M. Morse, jr., esq., No. 7 Court Square, in the city of Boston, in the State of Massachusetts, we shall take the deposition of the above-named plaintiff, George O. Marcy, before some officer authorized by law to take the same as a witness, said deposition to be read in evidence on the trial of the above-entitled suit on the part of said plaintiff, the taking of which said deposition will commence at ten o'clock a. m. of said day, and be continued as long as may be necessary, when and where you may appear and cross-examine if you see fit.

Respectfully yours,

WILSON & PERRY,
Attys. for said Pla'ntiff.

Chicago, May 29, 1875.

(Endorsed:) Filed July 6, 1875. Wm. H. Bradley, clk.

20 *Deposition.*

Circuit court of the United States for the northern district of Illinois.

GEORGE O. MARCY
vs.
TOWN OF ELMWOOD.
} Assumpsit.

James H. Beveridge, of the city of Springfield, being duly sworn, says that on the 29th day of December, A. D. 1874, he presented for payment at the office of the State treasurer, Springfield, Illinois, thirty-six interest-warrants or coupons of the Town of Elmwood for the sum of $100 each, thirty of which are in the words and figures following, (except the numbers,) namely:

$100. Elmwood Township railroad bond. [No. .

INTEREST-WARRANT.

Supervisor of Elmwood Township, Peoria County, Illinois, pay to bearer, July 1, 1872, one hundred dollars, at the office of the State treasurer, Springfield, Illinois.

L. F. JONES, *Supervisor.*
S. M. FARRAR, *Town Clerk.*

21 Which said coupons were numbered, respectively, 36, 37, 38, 39, 40, 41, 42, 43, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, and 75. That two of said thirty-six coupons were in like words and figures, except that they were payable July 1, 1873, and were numbered 37 and 38 respectively.

That four of said thirty-six coupons were in like words and figures, except that they were payable July 1, 1874, and were numbered 71, 73, 74, and 75.

Affiant says that he presented said coupons at the time and place first above stated, and demanded payment of the same, and that payment was refused.

JAMES H. BEVERIDGE.

Subscribed and sworn to before me this 1st day of July, A. D. 1875.

[SEAL.] R. P. JOHNSTON,
Notary Public in and for Sangamon County, Illinois.

(Endorsed :) Filed July 9, 1875. Wm. H. Bradley, clerk.

22 And afterwards, to wit, on the 16th day of July, 1875, in the record of the proceedings of said court in said cause is the following entry, to wit:

GEORGE O. MARCY
vs. Assumpsit.
TOWN OF ELMWOOD.

Now come' the defendant, by its attorney, and moves the court to set aside and vacate the judgment and verdict entered herein on the ninth instant and grant a new trial.

And afterwards, to wit, on the 28th day of July, A. D. 1875, in the record of the proceedings of said court in said cause is the following entry, to wit:

GEORGE O. MARCY
vs. Assumpsit.
TOWN OF ELMWOOD.

Now come' the parties by their attorneys, and thereupon, by agreement, the judgment heretofore entered herein on the ninth day of July, last past, is vacated and set aside, and, by agreement and stipulation filed, this cause is submitted to the court without the intervention of a jury; and *the court* after hearing the evidence and the argument of counsel, the circuit judge finds the issue for the plaintiff, and by his direction it is ordered that judgment be entered herein in the sum of four thousand two hundred and five dollars and ninety cents, as
23 damages herein, to which finding the district judge dissents *thereto.*

It is thereupon considered and adjudged by the court that the said plaintiff do have and recover of and from the said defendant the said sum of four thousand two hundred and five dollars and ninety cents, the damages so as aforesaid found and assessed, together with the costs and charges herein, taxed at fifty-five dollars and sixty-five , and that he have execution therefor.

And afterwards, to wit, on the said 28th day of July, A. D. 1875, the following certificate of division of opinion by the honorable the judges of said court was made and filed in said court.

24 *Certificate of division of opinion.*

UNITED STATES OF AMERICA,
Northern District of Illinois:

Circuit court of the United States, northern district of Illinois.

GEORGE O. MARCY
vs.
THE TOWN OF ELMWOOD.
} July term, 1875.

Certificate of opposition of opinion between the judges of said court.

At a circuit court of the United States, begun and held at Chicago, in and for the said district, on the 28th day of July, in the year
25 of our Lord one thousand eight hundred and seventy-five.

Present Hon. Thomas Drummond and Hon. Henry W. Blodgett, judges, before whom said cause was heard.

Statement of issues.

Action of assumpsit commenced to the March term, 1875, to recover upon 36 c'upons, thirty of which, numbered from 36 to 43 inclusive, and from 54 to 75 inclusive, fell due July 1, 1872; and two of which coupons, numbered 37 & 38, matured July 1st, 1873; and four, numbered 71, 73, 74, 75, matured July 1st, 1874, the form of which c'upons is substantially as follows:

No. Elmwood Township railroad bond.

INTEREST-WARRANT.

Supervisor of Elmwood Township, Peoria County, Illinois,. pay to bearer, July 1st, 1872, one hundred dollars, at the office of the State treasurer, Springfield, Illinois.

L. F. JONES, *Supervisor.*
26 S. M. FARRAR, *Town Clerk.*

Plea, general issue, with stipulation that any facts constituting a defense to the action may be proved under said plea with the same effect as if specially pleaded.

One the day of June, 1875, this cause coming on for trial upon the merits, the following facts and private acts of the legislat*ion* of Illinois were proven:

1st. That said coupons were cut from the bonds hereinafter named bearing the same numbers respectively as the said coupons, and were for interest purporting to be due thereon on the 1st day of July, 1872 and 1873 and 1874, as above stated; and that the same were purchased by the plaintiff for value at 100 cents on the dollar, before any of said c'upons matured, and without any actual knowledge or information of any defense.

2nd. That the bonds from which said coupons were detached are, in substance, as follows:

27 UNITED STATES OF AMERICA,
State of Illinois:

ELMWOOD.

Number . Dollars 1,000.

Township Railroad Bonds.

Know all men by these presents, that the township of Elmwood, in the county of Peoria, and State of Illinois, acknowledges itself to owe and be indebted unto the bearer hereof the sum of one thousand dollars, payable on the 1st day of July, A. D, 1889, with interest thereon at the rate of ten per centum per annum, payable annually on the 1st day of July in each year, at the office of the State treasurer, in Springfield, Illinois, upon presenting and delivering of the proper coupons hereunto annexed until the payment of the principal sum.

28 This bond is issued under and by virtue of a law of the State of Illinois, entitled "An act to *e*ncorporate the Dixon, Peoria & Hannibal Railroad Company," approved March 5th, 1869, and amended and approved March 9th, 1869, and also in virtue of an act entitled "An act to legalize a certain election therein named," approved April 17th, 1869, authorizing the several townships, cities, or incorporated towns in the counties through which the road may be located to subscribe and take stock in the Dixon, Peoria & Hannibal Railroad Company, to an amount not exceeding one hundred thousand dollars to each township, city, or incorporated town, and to pay for the same in the bonds of said township, city, & town coming due twenty years from the date of their issue, and bearing interest at a rate not exceeding ten per cent. per annum, payable annually, and in accordance with the vote of the electors of said township at the special election held March 16th,
A. D. 1869, in accordance with the provisions of said act; and
29 the faith of the township of Elmwood is hereby pledged for the
payment of the principal sum and interest thereon as aforesaid.

In testimony whereof the supervisor and clerk of said township of Elmwood have subscribed this bond this 27th day of April, A. D. one thousand eight hundred and sixty-nine.

L. F. JONES, *Supervisor.*
S. M. FARRAR, *Town Clerk.*

30 3d. That the Dixon, Peoria and Hannibal Railroad Company was, incorporated by an act of the legislature of the State of Illinois, in force March 5, 1867, the sixth section of which act is as follows: "The several counties in which any part of said road may hereafter be located and the several townships in said counties which have adopted or may hereafter adopt township organization, and the cities and incorporated towns in said counties hereby authorized to subscribe and take stock in said Dixon, Peoria and Hannibal Railroad Company.

"Elections may be held in any such county, township, city, or incorporated town upon the question whether such county, township, city, or town shall subscribe for any specified amount of the stock of said company, not exceeding one hundred thousand dollars for each county, and not exceeding thirty-five thousand dollars for each of such township' cities, or towns, and elections may be held in any such county, township, city, or town, as often as a petition shall be presented as hereinafter
specified, until such county, township, city, or town shall have
31 subscribed for the full amount of stock authorized by this act.

"Whenever a petition shall be presented to the board of super-

visors, signed by fifty legal voters of any such county, setting forth the amount of stock proposed to be taken by any such county, and specifying the time for holding such an election, it shall be the duty of the county clerk of such county to give twenty days' notice of the time of holding such election, which shall be the same time as that specified in such petition, and whenever a petition shall be presented to the supervisor of any such township, or to the corporate authorities of any such city or town, signed by twenty-five legal voters of any such township, city or town, setting forth the amount of stock proposed to be taken by any such township, city, or town, and specifying the time for holding such an election, it shall be the duty of the clerk of every such township, city, or town, to give twenty days' notice of the time of holding such an
election in such township, city, or town, which shall be the same
32 as that specified in such petition, which said notice or notices
shall be given in the same manner, and such election or elections shall be conducted in the same mode, and at the places provided for holding general elections in such counties, townships, cities, and towns, at which election or elections the qualified voters of the respective counties, townships, cities, and towns, shall vote 'For subscription,' or 'Against subscription,' and if a majority of the votes actually cast at any such election shall be 'For subscription,' it shall be the duty of the board of supervisors of every such county, the supervisor and clerk of any such township, and the corporate authorities of such city or town, to subscribe without unnecessary delay, upon request of said company, for stock in said company, to the amount mentioned in such petition, and to issue and deliver to said company the same amount as the stock so subscribed of the bonds of such county, township, city, or town, as the case may be, payable at any time specified, not exceeding twenty
years from their date, with interest at a rate not exceeding ten per
33 cent. per annum, payable annually, which said bonds and the in-
terest accruing thereon, shall be made payable at such place within the United States as said company may request."

4th. That, on the 11th day of February, 1869, a petition signed by thirty-one legal voters of the said town of Elmwood was presented to the supervisor of said town, representing that they desired an election to be called in pursuance of the provisions of the said charter of said railroad company, to be held on the 16th day of March, 1869, for the purpose of deciding by ballot whether the said township would subscribe thirty-five thousand dollars to the capital stock of said railroad company and issue the bonds of said township in payment for the same in the manner provided by said charter.

That, in pursuance of said petition, an election was notified and held in the manner provided by said charter on the said 16th day of March, 1869, at which election three hundred and forty-six votes were cast in favor of such subscription, and one hundred and forty-one against it.

34 5th. That on the 16th day of February, 1869, the supervisor,
town clerk, two justices of the peace, and twelve freeholders of said township filed in the office of the town clerk thereof a petition requesting that a special town meeting of the legal voters of said town be called, to determine by ballot "whether said town will subscribe for the capital stock of said Dixon, Peoria and Hannibal Railroad Company, to any amount; and, if so, to what amount over and above the thirty-five thousand dollars authorized by the charter of said company, and *a* reference to which a meeting of said legal voters has also been called."

That in pursuance of said last-named petition, an election was notified

by the town clerk on the 16th day February, A. D. 1869, and holden at
the same time and place with the election held in pursuance of said first-
named petition, and that said last-named election three hun-
35 dred and forty-five votes were cast in favor of an additional sub-
scription of forty thousand dollars to the stock of said railroad
company over and above the amount authorized by the said charter, and
one hundred and forty votes were cast against such additional subscrip-
tion.

6th. That on the 9th day of March, 1869, an act of the legislation of the State of Illinois was enacted, as follows:

"That an act entitled 'An act to incorporate the Dixon, Peoria and
Hannibal Railroad Company,' approved March 5th, 1867, be so amended
as to authorize the several counties in which any part of said road may
be hereafter located, to subscribe or make donations under the provision'
of said company, in any amount not exceeding two hun-
dred thousand dollars for any such county, and that the townships, cities,
and incorporated towns in any such county be, and are hereby, au-
36 thorized to subscribe or make donations under the provisions of
said act to the capital stock of said company in any amount not ex-
ceeding one hundred thousand dollars for any such township, city, or
incorporated town.

"SEC. 2. This act shall be in force from and after its passage.

"Approved March 9, 1869."

7th. That on the 17th day of April, 1869, an act of the legislature of the State of Illinois was enacted, as follows:

"That a certain election held in the township of Elmwood, in Peoria
County, on the 16th day of March, anno Domini one thousand eight
hundred and sixty-nine, at which a majority of the legal voters in said
township, in special town meeting, voted to subscribe for and take forty
thousand dollars of the capital stock of the Dixon, Peoria and Hanni-
bal Railroad Company over and above the thirty-five thousand dollars
which was on the same day subscribed for and taken in accord-
37 ance with the provisions of the charter of said company, is hereby
legalized and confirmed and is declared to be binding upon said
township; and the said forty thousand dollars when subscribed accord-
ing to the conditions of said vote may be collected from said township
in the same man'er as if the said subscription has been made under the
provisions of said charter.

"SEC. 2. This act shall be decreed a public act, and shall take effect and be in force from and after its passage.

"Approved April 17, 1869."

8th. That on the 27 day of April, 1869, the supervisor and town clerk
of said town issued and delivered to the president and secretary of said
railroad company the bonds of said township to the amount of $75,000,
with coupons attached for the annual interest thereon, in payment for
the capital stock of said company subscribed and taken in pursuance of
both the elections aforesaid.

38 9th. That before the commencement of said suit said coupons
were presented for payment, at the office of the State treasurer, at
Springfield, Illinois, and also to the supervisor of said township, but
payment thereof was refused.

10th. That soon after the receipt of said bonds by the railroad company as aforesaid, said company, under a power to lease in its charter, made a lease for ninety-nine years of its road and all of its property to the Chicago, Burlington and Quincy Railroad Company, which has ever since had possession of and operated said road, and the capital stock of said Dixon, Peoria and Hannibal Railroad Company is, and has ever since been, of no market value.

And that said last-named railroad has only been constructed from its junction with said Chicago, Burlington and Quincy Railroad at Buda, Illinois, to its junction with the same road at Elmwood, Illinois.

11th. That upon receipt of the bonds aforesaid, the president
39 and secretary of said railroad company delivered to said
supervisor and town clerk a certificate of the capital stock of said Dixon, Peoria and Hannibal Railroad Company, for the amount of $75,000, the amount of said bonds, and the same has not been returned or tendered to said company by said town of Elmwood.

12th. That the said Dixon, Peoria and Hannibal Railroad was, after the passage of its charter by the legislature as aforesaid, located in said township of Elmwood, in the county of Peoria, and State of Illinois, prior to the date of the said first election and the issue of the bonds aforesaid, and that township organization was adopted in said township prior to the date of the passage of the charter of said railroad company.

13th. That there is now due upon the said coupons the sum of forty-one hundred and ninety-two & $\frac{90}{100}$ dollars, according to their tenor,
which amount the plaintiff is entitled to recover if entitled to
40 judgment in the cause.

Upon the hearing of said cause as aforesaid, and during said term, it occurred as a question, whether, upon the facts and under the acts of the legislature aforesaid, there existed at the time of the issue of said bonds power and lawful authority to issue said bonds and coupons so as to render the said coupons valid and collectable in the hands of the plaintiff; on which question the opinions of the said judges were opposed.

Whereupon, on motion of counsel for defendant that the point of disagreement aforesaid may, during the term aforesaid, be stated under the direction of the judges and duly certified under the seal of this court to the Supreme Court, to be finally decided, it is ordered that the foregoing statement of the pleadings and of the facts, which is made under the
direction of the said judges, be certified according to the request
41 of the defendant by its counsel, as aforesaid, and according to the
law in such case made and provided.

United States circuit court, northern district of Illinois, July term, A. D. 1875.

GEORGE O. MARCY
vs. } Assumpsit.
TOWN OF ELMWOOD.

It is hereby stipulated that the above case shall be, and the same is hereby, submitted to the court for trial without a jury.

And it is hereby further stipulated and agreed by the said plaintiff and defendant, that the said cause now being taken on error to the Supreme Court of the United States, as per certificate of decision made by the judges of said circuit court, shall be submitted to the said Supreme Court at the next term thereof, within the first ninety days after the first day of said term, under the provisions of rule 20 of the rules of said
Supreme Court.
42 July 28, 1875.

WILSON & PERRY,
Attorneys for Geo. O. Marcy.
H. B. HOPKINS,
Attorney for Town of Elmwood.

(Endorsed:) Filed July 28, '75. Wm. H. Bradley, ck.

43 UNITED STATES OF AMERICA:

Supreme Court of the United States.

GEORGE O. MARCY
v.
THE TOWN OF ELMWOOD.

Error to the circuit court, northern district of Illinois, on division of opinion.

Know all men *do* by these presents that we, the Town of Elmwood, in the county of Peoria, and State of Illinois, and , of the county aaforesaid are held and firmly bound unto George O. Marcy, in the sum of five hundred dollars, to be paid to said George O. Marcy, his executors or administrators; to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated this day of August, A. D. 1875.

Whereas the above-named Town of Elmwood hath prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered in the above-entitled action by the circuit court of the United States in and for the northern district of Illinois, at
44 the May term thereof, A. D. 1875, wherein said George O. Marcy recovered a judgment against said Town of Elmwood, upon the opinion of one of the judges of said court, to wit, the presiding judge thereof, the other judge of said court dissenting thereto; and a certificate of decision of opinion having been prepared under the direction of said judges, and made matter of record according to the statute in such case made and provided:

Now, therefore, the condition of this obligation is such that if the above-named Town of Elmwood shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE TOWN OF ELMWOOD. [SEAL.]
By { H. P. TRACY, *Supervisor.*
A. HUFFMAN, *Town Clerk.*
A. M. WELLS. [SEAL.]
J. H. GRAHAM. [SEAL.]
J. W. SNYDER. [SEAL.]
WILLIAM STROTHER. [SEAL.]
C. B. MOREY. [SEAL.]

Approved.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Sept. 7, 1875. W. H. Bradley, clk.

45 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the foregoing to be a full, true, and complete transcript of the record and proceedings of said court, had in the cause wherein George O. Marcy was plaintiff and Town of Elmwood was defendant, as the same appears from the records of said court now on file and remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this 7th day of October, A. D. 1875, and of our Independence the 100th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

46 The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in said court before you between George O. Marcy, plaintiff, and Town of Elmwood, defendant, a manifest error hath happened, to the great damage of the said Town of Elmwood, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief-Justice of the
47 Supreme Court of the United States, this 28th day of July, A. D. 1875.

[SEAL.] WM. H. CLERK,
Clerk Cir. Court U. S. Northern Dist. of Illinois.

(Indorsed:) George O. Marcy v. Town of Elmwood. Writ of error. Returnable Oct. T., 1875.

48 UNITED STATES OF AMERICA, *ss:*

To GEORGE O. MARCY, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1875, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein the Town of Elmwood is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Hon. H. W. Blodgett, judge of the circuit court of the United States for the northern district of Illinois this 7th day of Sept., A. D. 1875.

H. W. BLODGETT.

49 I, the within-named defendant in error, do accept service of the within citation, and acknowledge that the same has been duly served upon me according to law this 7th day of September, A. D. 1875.

GEORGE O. MARCY,
By WILSON & PERRY,
His Attorneys.

(Indorsed:) Citation.

50 In the *supreme* court of the United States for northern district of Illinois.

THE TOWN OF ELMWOOD *vs.* GEORGE O. MARCY. } Error to said circuit court.

And now comes the plaintiff in error by H. B. Hopkins & E. G. Johnson, attorneys, and for assignment of error says that there is manifest error in the proceedings of the court below in this:

The said court erred in rendering judgment for the plaintiff below.

Said court further erred in not rendering judgment for defendant below for cost.

Said court further erred in finding that said township had any lawful authority to issue the bonds or c'upons named in said record.

Said court further erred in finding that the bonds & coupons named in said record were valid obligations against said township.

And for those errors plaintiff prays that the judgment aforesaid be reversed.

H. B. HOPKINS,
E. G. JOHNSON,
R. G. INGERSOLL,
Attys. for Plff.

(Indorsed:) Assignment of errors.

(Indorsement on cover:) No. 710. The Town of Elmwood, plaintiff in error, vs. George O. Marcy. N. Illinois C. C. U. S. Filed 14th October, 1875.

REC. 710—2

No. .... *Agenda No.* ....

SUPREME COURT U. S. A.

To the October Term, A.D. 1876.

THE TOWN OF ELMWOOD,
vs.
GEORGE O. MARCY.

Error to the Circuit Court of the United States for the Northern District of Illinois. Upon Certificate of Division of Opinion.

Brief for the Plaintiff in Error

Filed *1876*

.... *Clerk.*

H. B. Hopkins,
J. H. Morron,
E. G. Johnson,
for Plaintiffs in Error

Franks & Sons, Printers, 215 Main St., Peoria, Ill.

IN THE SURPEME COURT OF THE UNITED STATES.

TO THE OCTOBER TERM, A.D. 1875.

THE TOWN OF ELMWOOD,
vs.
GEORGE O. MARCY,

Error to the Circuit Court of the United States for the Northern District of Illinois.
Upon Certificate of Division of Opinion.

BRIEF FOR THE PLAINTIFFS IN ERROR.

Statement of Case.

Action, assumpsit in the court below, commenced February 11, 1875, on thirty-six coupons, or interest warrants, for $100 each.

Plea the general issue, with stipulation that all special defenses might be given under it.

July 28th, 1875, the case was tried by the court without a jury, before Hon. Thomas Drummond, circuit judge, and Hon. Henry W. Blodgett, district judge, and upon the opinion of the said circuit judge, judgment was given for plaintiff below for $4,205.90 and costs, the said district judge dissenting.

On the same day the said judges made, and placed of record, their certificate of division of opinion, showing, in addition to the foregoing facts, the following:

1st. That said coupons are numbered from 36 to 43 inclusive, and from 55 to 75 inclusive, payable July 1st, 1873; also from 71 to 75 inclusive, payable July 1st, 1873, and 37 and 38, payable July 1st, 1874, and read as follows:

No. (—) *Elmwood Township Railroad Bond.*

INTEREST WARRANT.

Supervisor of Elmwood township, Peoria county, Illinois, pay to the bearer, July 1st, 187(-), one hundred dollars, at the office of the State Treasurer, Springfield. L. F. JONES, Supervisor.
S. M. FARRAR, Town Clerk.

That the said coupons were cut from certain bonds bearing the same numbers, and were for interest purporting to be due thereon, and were purchased by plaintiff below, at par value before maturity.

2d. That the bonds from which said coupons are taken are as follows:

UNITED STATES OF AMERICA, STATE OF ILLINOIS,
Elmwood Township Railroad Bonds,
Number ———. Dollars, 1,000.

Know all men by these presents that the township of Elmwood in the county of Peoria and state of Illinois, acknowledges itself to owe and be indebted unto the bearer hereof, the sum of one thousand dollars, payable on the first day of July, A.D. 1889, with interest thereon, at the rate of ten per centum per annum, payable annually on the 1st day of July in each year, at the office of the State Treasurer in Springfield, Illinois, upon presenting and delivering of the proper coupons hereunto annexed until the payment of the principal sum.

This bond is issued under, and by virtue of, a law of the state of Illinois, entitled "An Act to incorporate the Dixon, Peoria & Hannibal Railroad Company," approved March 5th, 1869, and amended and approved March 9th, 1869, and also in virtue of an act entitled "An Act to legalize a certain election therein named." approved April 17th, 1869, authorizing the several townships, cities, or incorporated towns in the counties through which the road may be located to subscribe, and take stock in, the Dixon, Peoria and Hannibal Railroad Company, to an amount not exceeding one hundred thousand dollars to each township, city, or incorporated town, and to pay for the same in the bonds of said township, city and town coming due twenty years from the date of their issue, and bearing interest at a rate not exceeding ten per cent. per annum, payable annually, and in accordance with the vote of the electors of said township, at the special election held March 16th, A.D. 1869, in accordance with the provisions of said act; and the faith of the township of Elmwood is pledged for the principal sum and interest thereon as aforesaid.

In testimony whereof the supervisor and clerk of said township of Elmwood have subscribed this bond this 27th day of April A.D. one thousand eight hundred and sixty-nine. L. F. Jones, Supervisor.
S. M. Farrar, Town Clerk."

3d. That the Dixon, Peoria & Hannibal Railroad Company was incorporated by an act of the legislature of Illinois, in force March 5th, 1867.

That section six of said act is as follows:

"The several counties in which any part of said road may hereafter be located, and the several townships in said counties which have adopted or may hereafter adopt township organization, and the cities and incorporated towns in said counties, are hereby authorized to subscribe and take stock in, said Dixon, Peoria and Hannibal Railroad Company. Elections may be held in any such county, township, city or incorporated town, upon the question whether such county, township, city or town shall subscribe for any specified amount of the stock of said company, not exceeding one hundred thousand dollars for each county, and not exceeding thirty-five thousand dollars for each of such townships, cities or towns; and elections may be held in any such county, township, city or town as often as a petition shall be presented as hereinafter specified, until such county, township, city or town shall have subscribed for the full amount of stock authorized by this act. Whenever a petition shall be presented to the board of supervisors, signed by fifty legal voters of any such county, setting forth the amount of stock proposed to be taken by any such county, and specifying the time for holding such an election, it shall be the duty of the county clerk of such county to give twenty day's notice of the time of holding such election, which shall be the same time as that specified in such petition, and whenever a petition shall be presented to the supervisors of any such township, or to the corporate authorities of any such city or town, signed by twenty-five legal voters of any such township, city or town, setting forth the amount of stock proposed to be taken by any such township, city or town, and specifying the time for holding such an election, it shall be the duty of the clerk of every such township, city or town to give twenty day's notice of the time of holding such an election in such township, city or town, which shall be the same as that specified in such petition, which said notice or notices shall be given in the same manner, and such election or elections shall be conducted in the same mode and at the places provided for holding general elections in such counties, townships, cities and towns, at which election or elections the qualified voters of the respective counties, townships, cities and towns shall vote " For Subscription," or "Against Subscription"; and if a majority of the votes actually cast at any such election shall be " For Subscription," it shall be the duty of the board of supervisors of every such county, the supervisor and clerk of any such township, and the corporate authorities of such city or town, to subscribe without unnecessary delay, upon request of said company, for stock in said company to the amount mentioned in such petition, and to issue and deliver to said company the same amount as the stock so subscribed of the bonds of such county, township, city or town, as the case may be, payable at any time specified not exceeding twenty years from their date, with interest at a rate not exceeding ten per cent. per annum, payable annually, which said bonds and the interest accruing thereon shall be made payable at such place within the United States as said company may request." *Private Laws of Illinois, 1867, Vol. 2, page 604, sec. 6.*

4th. That on the 11th day of March, 1869, proceedings were had, purporting to be under the sixth section aforesaid, viz: the petition of thirty-five voters was presented to the supervisor requesting an election to be called and held on the 16th of March, 1869, to determine whether said town would subscribe thirty-five thousand dollars to the capital stock of said company, and issue its bonds in payment for the same as provided by said charter; that said election was called and held on said day and resulted in favor of such subscription.

5th. That on the 16th day of February, 1869, another petition, not purporting to be under said sixth section of said charter, signed by the supervisor, town clerk, two justices of the peace and twelve voters, was filed in the town clerk's office, requesting a special town meeting to be called and held on said 16th day of March, 1869, to determine "Whether said town will subscribe for the capital stock of said Dixon, Peoria & Hannibal Railroad Company to any amount and if so, to what amount, *over and above the thirty-five thousand dollars authorized by the charter of said company*, and in reference to which a meeting of said legal voters has also been called," which last named election was also notified and held on said day named, and resulted in a vote in favor of subscribing and issuing bonds for forty thousand dollars over and above the amount authorized by said charter."

6th. That on the 9th day of March, 1869, said legislature adopted an amendment of the charter of said railroad company as follows:

"That an Act entitled An Act to incorporate the Dixon, Peoria and Hannibal Railroad Company, approved March 5, 1867, be so amended as to authorize the several counties, in which any part of said road may be hereinafter located, to subscribe or make donations under the provisions of said act, to the capital stock of said company, in any amount not exceeding two hundred thousand dollars, for any such county, and that the townships, cities and incorporated towns in any such county be and are hereby authorized to subscribe or make donations under the provisions of said act, to the capital stock of said company in any amount not exceeding one hundred thousand dollars, for any such township, city or incorporated town. This act shall be in force from and after its passage."

Private Laws of Illinois, 1869, Vol. 3, p. 283.

7th. That on the 17th day of April, 1869, said legislature adopted another act as follows:

"That a certain election held in the township of Elmwood in Peoria county, on the sixteenth day of March, Anno Domini one thousand eight hundred and sixty-nine, at which a majority of the legal voters in said township, in special town meeting, voted to subscribe for and take forty thousand dollars of the capital stock of the Dixon, Peoria and Hannibal Railroad Company, over and above the thirty-five thousand dollars which was, on the same day, subscribed for and taken in accordance with the provisions of the charter of said company, is hereby legalized and confirmed, and is declared to be binding upon said township; and the said forty thousand dollars, when subscribed according to the conditions of said vote, may be collected from said township in the same manner as if the said subscription had been made under the provisions of said charter.

This act shall be deemed a public act, and shall take effect and be in force from and after its passage."

Private Laws of Illinois, 1869, Vol. 3, p. 373.

8th. That on April 27th, 1869, the supervisor and town clerk of said town, assuming the validity of both said elections, subscribed $75,000 to the stock of the said railroad company, and issued to the president and secretary of said company, seventy-five 1000 dollar township bonds, numbered consecutively from one to seventy-five, the coupons aforesaid being attached to those whose numbers correspond to theirs; and said president and secretary delivered to said supervisor and town clerk a certificate of stock in said railroad company, which has not been tendered nor returned to the company.

9th. That before suit, plaintiff below presented said coupons to the state treasurer and to the supervisor of said township and the same were not paid.

10th. That the railroad of said company was located in said township of Elmwood after the passage of its charter and prior to the date of said first named election proceedings, and that township organization was adopted in said township prior to the date of said charter.

11th. That soon after the receipt of said bonds, said company leased its road and all its fixtures and property to the Chicago, Burlington and Quincy Railroad Company for ninety-nine years, and the lessee has ever since had sole possession of, and operated said road, since which time the stock of the Dixon, Peoria and Hannibal Railroad Company has not had any market value, and its road has never been built, except from its junction with the road of said Chicago, Burlington and Quincy Railroad Company at Buda, Illinois, to its junction with the same road at Elmwood, Illinois.

The Honorable, the said judges of the court below, certify that they are divided in opinion as to whether, under the facts and legislative acts aforesaid, there existed power and lawful authority to issue said bonds and coupons, so as to render them valid in the hands of the plaintiff.

We respectfully submit that the said bonds and coupons are null and void for two following reasons:

FIRST.—Because their issue was and is inhibited by the Constitution of the State of Illinois, and the said acts of the Legislature of Illinois, upon which they depend for their validity, were and are unconstitutional and void.

SECOND.—Because they were issued in plain violation of the letter and spirit of the acts which purport to authorize their issue.

In support of the foregoing propositions, we beg leave to submit the following

ARGUMENT.

I.

By the foregoing facts, and their chronological order, it appears that the Dixon, Peoria and Hannibal Railroad Company was incorporated March 5th, 1867; that prior to February 11th, 1869, the road of said company was located in said township of Elmwood; that at the date last named, an election was called under the provisions, of said charter to be held on March 16, 1869, to determine whether said township would subscribe to the stock of said railroad company, and give its bonds for $35,000—the maximum amount permitted by law; that five days afterwards, to-wit: on the 16th of February, 1869, another election, not purporting to be in pursuance of said charter, was notified to be held at the same time and place with that aforesaid, to determine whether said township would subscribe to the stock of said company, and issue the bonds for a further sum, over and above the amount authorized by law as aforesaid; that said first named election resulted in favor of subscribing said $35,000 and the second named election resulted in favor of an additional subscription of $40,000; that after both said elections were notified, and seven days before they were held, viz: on the 9th of March, 1869, the charter of said company was amended so as to authorize towns, in which said road might be *thereafter* located, to vote and subscribe $100,000 to its capital stock.

Also that thirty-two days after said elections, viz: on the 17th day of April, 1859, the legislature passed the so called validating act, and that ten days thereafter, on the 27th of April, 1869, the superviser and town clerk issued the bonds and coupons contemplated by both elections, numbered from one to seventy-five as aforesaid.

We maintain that neither said second election, nor said act attempting to validate it, gave any power to issue bonds, and when the bonds, numbering from one to thirty five inclusive, were issued, the power to issue was exhausted ; wherefore the bonds, numbering from thirty-six to seventy-five, from which all the coupons in question were taken, are void for want of power.

The identical bonds last named have been litigated in the state court, and upon full argument and deliberation adjudged null and void by the Supreme Court of Illinois.

Wiley v. *Silliman*, 62 Ill. 170;
Marshall v. *Silliman*, 61 Ill. 218.

In the two cases above cited, bills in equity were brought by certain tax payers of the town of Elmwood, in one case, and Brimfield in the other, against the county treasurer and collector of Peoria county, Illinois, and against the Dixon, Peoria and Hannibal Railroad Company, to perpetually enjoin the collection of any taxes for payment of interest upon the identical bonds now in question, in the Wiley case, and exactly similar bonds of the said town of Brimfield, in the Marshall case, and to declare them void, and require said railroad company to surrender them up to be cancelled.

The supreme court of the state, upon full hearing, adjudged that said so-called validating act of April 17th, 1869, was unconstitutional and void, and that said bonds were null and void, and that said collector should be perpetually enjoined from collecting taxes to pay interest on them, and said railroad company be required to surrender, to be cancelled, such bonds as it still held.

Said act of April 17th, 1869, is held to be in violation of the Constitution of Illinois, in two respects, viz:

1st. Because it attempts to confer the power of taxing a municipal corporation for corporate purposes, upon persons prohibited by the constitution from being so empowered.

2d. Because it attempts to compel a municipal corporation to contract and pay a debt for corporate purposes without its consent, which the legislature had not constitutional power to do.

If either of these grounds is correct, it follows, of course, that the bonds and coupons are void *ab initio*.

We urge that the decision of the state court upon the two points aforesaid, should be regarded as the law of this case.

First.—Because it is correct in principle.

Second.—Because, as an adjudication of the highest state tribunal in a common law proceeding, *touching the construction of its own constitution and the validity of laws passed under it, it is made the rule of this court by the 34th section of the Judiciary Act of September 24th, 1789.*

Said decisions of the state court are correct in principle.

First.—In holding that said act of April 17, 1869, attempts to confer the power of municipal taxation upon persons who are not the corporate authorities of the district to be taxed, and is therefore unconstitutional and void.

The present constitution of Illinois, adopted in 1870, prohibits the legislature from enacting any law permitting municipal corporations to subscribe to the stock of, or give aid to, any private corporation. *Revised Statutes, 1874, p. 82.* But the constitution of 1848, in force when the acts aforesaid were enacted, contained a qualified permission for the enactment of such laws. It is expressed by the 5th section of article nine of that constitution, which is as follows:

"The *corporate authorities* of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes, for corporate purposes, such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same. And the General Assembly shall require that all the property within the limits of municipal corporations belonging to individuals, shall be taxed for the payment of debts contracted under authority of law."

This clause has, ever since the adoption of the constitution of 1848, been understood, by the bench and the bar of Illinois, to have been placed therein solely *to impose a limitation* upon legislative action in delegating the power to tax municipal corporations. And, before the bonds in question were issued, or ever the election by which they were suggested was volunteered, that construction was solemnly announced by the highest State tribunal.

In *Howard et al.* v. *The St. Clair and Monroe Levee and Drainage Company et al.*, 51 Ill. 130, and in *Same* v. *The State of Illinois*, Id. 138, decided in January, 1869, that clause is decided to be a *constitutional limitation*, prohibiting the legislature from delegating the taxing power, except under the two-fold qualification of being, *first*, vested only in the "corporate authorities" of the municipalities to be taxed, and *second*, only for "corporate purposes."

That case arose under acts of, the legislature of Illinois passed February 24, 1859, and February 16, 1865, creating certain persons therein named, a body corporate, for the purpose of protecting from overflow, certain lands indicated, lying in St. Clair and Monroe counties, and conferring upon them the power of levying and collecting a tax of $20,000 a year, upon said lands. This tax being levied, certain of the land owners brought a bill in equity to enjoin its collection.

In deciding the case, the court, after quoting said 5th sec. of Art. 9, pp. 133, 134, 135, say: "We believe it has always been understood, that this clause limited local or corporate taxation, to local or corporate purposes, and it has always been so construed, whenever its construction has come before this court. This case presents the question, whether it was not also intended as a limitation upon the power of the legislature to grant the right of local or corporate taxation to any other persons than the corporate, or local authorities. * * * *

"We are clearly of opinion that this clause does forbid the legislature to grant the power of such local or corporate taxation to any other person than the local or corporate authorities. Under our Constitution, the right of taxation cannot be granted, either to private persons, or private corporations.

"Our reasons for this opinion are two-fold.

"The clause in question was not in the former constitution, and yet the right of the legislature under that constitution, to vest in municipal corporations the power of taxation for local and corporate purposes was exercised, and never denied or doubted. It is evident, then, this clause was not inserted in the the present constitution, as a necessary grant of power, or to remove a doubt as to its existence.

"It is, therefore, a just inference that its purpose was to define the class of persons to whom the right of taxation might be granted, and the purposes for which it might be exercised. And when the legislature seeks to grant it to any other than corporate authorities, or for any other than corporate purposes, it transgresses the limits of its power. If the clause in question was not designed as a limitation of power, no reason can be given why it was inserted in the constitution at all.

"Our second reason for holding it a limitation is, because of the intrinsic wisdom of the clause when so construed. While the clause, viewed as a grant of power, would have been a mere waste of words, in an instrument whose framers must necessarily have sought to avoid a single superfluous expression, if viewed as a limitation, it commands the cordial approval of our reason, as a judicious safeguard of private rights. * * *

"We are of the opinion that we do no violence to the language of the clause of the constitution we have been considering, by holding that it was designed to prevent such ill-advised legislation as the delegation of the taxing power to any person or persons, other than the corporate authorities of the municipality or district to be taxed. These authorities are elected by the people to be taxed, or appointed in some mode to which the people have given their assent, and to them alone can this power be safely delegated."

This construction has been uniformly adhered to and reiterated by the highest court of the state, from the date of the decision above referred to, down to the present time.

The next case, in which the same construction is announced, is *The People ex rel., McCagg et al., Commissioners of Lincoln Park* v. *Mayor, etc., of Chicago*, 51 Ill. 17, tried at June Term, A.D. 1869.

By an act of the legislature, approved February 8th, 1869, a board of commissioners was appointed, with power to purchase, for the City of Chicago, and improve certain lands, to be known as Lincoln Park, and the mayor, clerk, and comptroller of said city were required to issue and deliver to such commissioners, the bonds of said city of sufficient amount to defray the expenses of purchasing and improving such lands. These city officers refused to issue the bonds, and the park commissioners petitioned for a writ of mandamus to compel them to do so.

The supreme court in determining the right of the petitioners to the writ, say, that in *Howard* v. *St. Clair & M. Drainage Co.*, in giving a construction to the 5th section of Article 9, of the constitution, "We held this section was to be construed as a limitation upon the power of the legislature to delegate the right of corporate or local taxation, to any other than the corporate or local authorities."

And in regard to said park commissioners the court say, "Not being the corporate authorities of the City of Chicago, it cannot be said they are the authority contemplated by the fifth section of article nine of the constitution, in whom the legislature may vest the power of assessing and collecting taxes for corporate purposes." The writ of mandamus was accordingly denied.

The next case is *The People ex rel., Wilson et al., South Park Commissioners* v. *Soloman, Clerk of Cook County*, 51 Ill. 37, decided June Term, 1869.

An act of the legislature passed February 24th, 1869, erected three townships in Cook county, viz: South Chicago, Hyde Park, and Lake, into a *park district*, and authorized the governor to appoint five persons as South Park Commissioners, with power to locate, acquire and improve lands as a park for said towns, and to issue bonds in payment for the same, binding upon said three towns, and to annually report, to the county clerk of Cook county, the amount necessary to pay interest and expenses, and requiring said clerk to extend the amount so reported, in due form, in the next tax warrant for the collection of taxes in said towns.

The 18th section required the whole act to be submitted to the people of said towns at a general election, and if ratified by them to become a law, but not otherwise. This submission was made and the act ratified by a majority of the voters in each of said towns. The park commissioners made the required report to the county clerk, but he refused to receive it or extend the tax, and the commissioners applied for a writ of mandamus to compel him to do so.

In deciding the petitioner's right to this writ, the court, in regard to said constitutional provision, p. 48, say: "We have held in *Howard* v. *St. Clair aud Monroe Drainage Co.*, and in the case of *The People ex rel McCagg* v. *The Mayor, &c., of Chicago*, that this clause must be construed as a limitation upon the power of the legislature to authorize any other than corporate authorities to assess and collect local taxes."

The court held, however, that this prohibition does not extend to the length of preventing the legislature from forming new municipal corporations, with territorial limits embracing three townships, with corporate authorities of its own, who may, with the express consent of the people of the district, be authorized, to assess and collect the taxes of the district; that such a corporation is created by the act aforesaid, and said park commissioners, being so adopted by the people, as corporate authorities of the district, might assess and collect such taxes without transgressing said constitutional limitation.

The next case is *Hessler* v. *Drainage Commissioners*, 53 Ill. 105, decided at January term, 1870.

February 15th, 1855, the legislature passed an act constituting certain persons a body politic and corporate by the style of the Drainage Commissioners, who were authorized to drain certain lands in Cook county, and assess the expenses upon the lands. These assessments were to be a lien upon the lands, upon which they might be sold, or a judgment *in personam* might be recovered against the owners. The commissioners brought suit against Hessler for an assessment against his lands.

The supreme court, in deciding the case, p. 114, say: "We are able to perceive no essential difference between this case and *Howard's case.* In neither act has the constitutional limitation been observed. * * Believing it was not competent for the General Assembly, having our constitution in view, to pass the law in question, we must hold it invalid."

At the same time the case of *Foster* v. *The Drainage Commissioners*, 53 Ill. 115, was decided the same way, the case being in all respects like the others.

The next case is *Lovingston* v. *Wider et al.*, 53 Ill. 302, decided January term, 1870.

February 22d, 1867, the legislature passed an act authorizing the appointment, by the Governor, of three commissioners to have charge of the police department of the city of East St. Louis, and directing these commissioners to report annually to the City Council what sum would be necessary to defray the expenses of their department for the ensuing year, and requiring the Council to appropriate the amount. And if the Council should refuse to make such appropriation, the act authorizes these commissioners to issue certificates of indebtedness in the name of the city, and raise money by the sale of them. The Council did so refuse, and Lovingston brought a bill in equity to enjoin said commissioners from issuing and selling such certificates of indebtedness, relying upon the unconstitutionality of the act of the legislature aforesaid.

The court, in deciding this case, say, p. 304: "The validity of this act can hardly be considered an open question in this court, since the decision of *The People ex rel McCagg* v. *The Mayor of Chicago*, *Same ex rel Wilson* v. *Soloman*, *Same ex rel South Park Commissioners* v. *Common Council of Chicago*, and *Howard* v. *St. Clair Drainage Co.*

"We held in those cases that the fifth section of the ninth article of the constitution, authorizing the legislature to give the corporate authorities of cities and towns the right of taxation for corporate purposes, was to be construed as a limitation upon the power of the legislature to grant the right of local or corporate taxation to any other persons than the local or corporate authorities. * * * *

"These cases, in our judgment, are conclusive against the validity of the act under consideration.

"These Police Commissioners are not the corporate authorities of East St. Louis, therefore can have no power of taxation."

Following the march of these decisions come the cases of *Marshall* v. *Silliman*, 61 Ill. 218, and *Wiley* v. *Same*, 62 Ill. 170, decided at September term, 1871.

The last named suit involved the same bonds in question in this case; but, both cases presenting the same questions, a full opinion was given only in the Marshall case.

After quoting the said fifth section of article nine and refering to *Howard* v. *Drainage Co.*, and most of the cases above noticed, the court say, "The supervisor and town clerk who issued the bonds, do not represent the township as the board of trustees represents an incorporated town, or the common council represents a city. The supervisor and town clerk are but a part of the corporate authorities. They have no power of taxation nor power of themselves to bind the township in anything. * * * Though elected by the people, they were not elected for the purpose of creating a debt or imposing a tax, and the legislature could not clothe these two officers, without the consent of the people, with a discretionary power of taxation or of creating debts, because they are not, by themselves, the corporate authorities in the sense of the constitution."

The two last cited cases differ from all the foregoing only in holding that it is not competent for the legislature to single out from the corporate authorities the supervisor and town clerk, and confer upon them powers which the constitution limits them to conferring only upon the corporate authorities as an aggregate body.

We have presented an abstract of the foregoing cases for the purpose of showing that the case of *Wiley* v. *Silliman* is not a mere oscillation of the judicial balance in the state court, but stands upon the substratum of seven former decisions, reaching back to a date anterior to the inception of the bonds in question.

It has become a prominent doctrine of this court that the construction, which prevails in the state courts, at the time municipal bonds are issued, upon questions touching their validity, enters into, and forms a part of them, and shall ever after go with them as the settled law of those contracts, although the state court may have adopted a different ruling.

Gelpeck v. *City of Dubuque*, 1 Wal. 175;
Olcott v. *Supervisors, &c.*, 16 Wal. 678;
Havemeyer v. *Iowa County*, 3 Wal. 294;
Mitchell v. *Burlington*, 4 Wal. 270;
Christy vs. *Predgeon*, 4 Wal. 196.

True, this doctrine has been applied, in every case, to the sustaining of bonds. Under it the bondholder has sought protection from the decisions of the state courts, until the doctrine has now become too firmly settled for him to let go of it, when it is found to be two edged. By this doctrine, the statute under which these bonds were issued, and the construction which enters into and forms a part of them, show that they were void when issued. For, upon their face, when compared with the law upon which they stand, and to which they refer, they show that they were not issued by the corporate authorities, nor under any law conferring the power to issue them upon such authorities.

These bonds were therefore void *for want of power to issue them*, both under the rules of decisions adopted by this court, and under a sound construction of the state constitution.

We wish next to consider certain objections urged against the positions we have above taken.

As we have not access to any brief of defendant made to the court, we must be guided in anticipating him by his argument in the court below.

1st. It is asked, who are the corporate authorities of the townships, in the sense of the constitution?

It is sufficient for our purpose that the supervisor and town clerk were not such authorities, but we wish to give this question a fuller response.

It is objected that the township, as organized in Illinois, has no corporate authorities that represent it as the board of supervisors does the county, or the mayor and common council the city, or the board of trustees the incorporated town.

This is true. It is therefore obvious, we think, that while the constitution limits the legislature, so that it can delegate the power of imposing municipal taxes only to the corporate authorities, so long as a municipal corporation is unorganized, or so organized as to be without corporate authorities, the power of taxing that municipality cannot be delegated.

But the constitution expressly authorizes the delegation of this power to the corporate authorities of *townships*. This can hardly be treated as unmeaning language, and we think the board of officers, whom the framers of that instrument must have had in mind, is not difficult to discover.

The corporate authorities of any corporation are doubtless, primarily, the whole body of corporators, and in the absence of any more concentrated form of that authority, they only could be authorized to contract corporate debts, and impose taxes. Hence, those acts which delegate the power to the body of electors, with a fair and equal method of ascertaining and evidencing their discretionary exercise of it, are equally valid with those which delegate it to such official persons as also lawfully hold the corporate authority.

The constitution of 1848 was framed August 31st, 1847; ratified March 6, 1848, and went in force April 1, 1848. The first township organization law was enacted February 12, 1849 (Laws of 1849, p. 190). At the framing and adoption of that constitution, therefore townships were not organized municipalities in Illinois, but were bodies corporate only for school purposes, and their only "corporate authorities" were three township trustees of schools, and a town treasurer, by them appointed (Laws of 1847, p. 126). These were the only official persons who could then have answered the description of corporate authorities of the townships. And they could doubtless have been empowered to exercise local taxing power for school purposes. But the sixth section of article seven of that constitution requires the legislature to enact a general law for township organization, and under this clause, said act of February 12, 1849, and all subsequent township organization laws were enacted. And. as all constitutions are, in theory, framed for all time, the term "corporate authorities" must have been intended to include the township authorities as they then existed, or as they should thereafter exist by virtue of any law that should be enacted under the constitution. But it can never have meant *less* than those persons who should be lawfully exercising the corporate authority at the time when the legislature should attempt to delegate the power of taxing the township.

It seems too clear for doubt, that the constitution did intend to designate and limit certain official persons of the township, designated as the *corporate authorities* who, and who *only*, might be entrusted with the power of local taxation, and exercise it at such times, and to such an extent, as in their discretion, they should deem wise. No other construction worthy of the document, or the framers of it, can be put upon it.

Who, then, are these corporate authorities? The answer is plain and simple. The corporate authorities of any corporation are clearly those persons, and all of them, who, by the law creating and empowering it, are authorized to exercise its corporate powers. The corporate authorities of a township, therefore, are all those persons who, by the township organization laws, are authorized to be chosen to exercise the corporate authority.

When said act of April 17th, 1869, was enacted, and when said bonds were issued, the corporate authorities of the townships, required to be elected, were one supervisor, one town clerk, one assessor, one collector, one commissioner of highways, two constables, two justices of the peace, and as many overseers of highways as there are road districts in the town. *Gross Statutes of Illinois, Vol. 1, p. 744, section 2.*

Hence the supervisor and town clerk are not the corporate authorities, any more than the assessor and collector, or the commissioners of highways and the justices of the peace, and can no more be empowered to discharge the functions of the entire body, than any one or two of the others, or than any unofficial third person.

None of these township officers has, nor have all of them collectively, any power to contract debts for the township, or to represent it financially. They hold no such attitude to the township as the mayor and common council do to a city, or the board of trustees to an incorporated town; but each has specified duties of a quite different nature; but they are none the less *corporate authorities*, because, from the nature of the corporation, their duties are different from those of an incorporated town or city.

The mayor and common council are the corporate authorities of a city for the purposes of local taxation, because they represent the city in all legislative, financial and discretionary matters. The president and trustees of an incorporated town, and the board of supervisors of a county, are the corporate authorities of these municipalities for a like reason. The organic functions of the townships admit of no such board of plenary agents. Yet the wisdom of the constitution has not left them to be burdened with local taxation without a safeguard. Hence the action of the board of township authorities, although all its other duties are of a different character, is interposed as a check upon improvident taxation.

We submit, therefore, that the act delegating this power to the supervisor and clerk, or any other fractional part of such board of corporate authorities, is no more in conformity with the constitutional restriction, than if such persons were not township officers at all, but were Drainage Commissioners, Park Commissioners, or Police Commissioners.

In three of the cases before cited, the supreme court of Illinois have defined the term corporate authorities, as used by the constitution, in this language: " Corporate authorities are those municipal officers, who are either directly elected by the people to be taxed, or appointed in some mode to which they have given their assent.

People, ex rel. v. *Mayor of Chicago*, 51 Ill. 30.
Hessler v. *Drainage Commissioners*, 53 Ill. 113.
Lovingston v. *Wider*, 53 Ill. 304.

This we submit is a correct definition, and embraces all the township officers we have above enumerated.

The case of *Keithsburg* v. *Frick*, 34 Ill. 405, decided in 1864, has been urged as adopting a different construction of the constitutional power of the legislature from that indicated by the cases above cited.

If that be true, the rule was changed to that expressed by the cases we have cited, before the bonds in question were issued, and it is the construction which prevails in the state courts, at the time the bonds are issued, which becomes crystalized in them, not that which had formerly prevailed.

But an examination of that case will show that it promulgates no different rule than that established by the cases we have cited.

The town of Keithsburg was first organized under a general act for the incorporation of towns and cities, which confers no power to subscribe for stock in railroad companies. But, under an act concerning railroads, adopted November 6, 1849, (*Laws of 1849, 2d Sess., p. 28,*) empowering counties and cities to subscribe for such stock, an election was held, November 14th, 1855, and vote taken to subscribe twenty thousand dollars to the stock of the Warsaw and Rockford Railroad Company. It was claimed that this election was void, but no court ever decided whether it was or not. No subscription was made, or bonds issued in pursuance of it, nor until after the legislature, on the 16th of February, 1857, had passed a special charter for said town, *Private Laws of 1857, p. 868*, by the second section of which the president and trustees were empowered to subscribe twenty thousand dollars to the stock of said railroad company and issue bonds therefor.

The seventeenth section, assuming that a subscription had been made, (which the case, p. 412, shows was not the fact), enacts that it shall be affirmed and the president be authorized to issue bonds in payment of it.

It is claimed that this case holds

First.—That it is competent for the legislature to authorize the corporate authorities to exercise the power of local taxation without submitting it to a vote.

This is certainly true, and we concede its correctness. Indeed we hardly need be told that the constitutional limitation against delegating the taxing power to any but the corporate authorities, does not carry with it the further limitation that it cannot be exercised unless by vote of the people. But this is not to the purpose. The question is not whether the taxing power may be conferred without requiring a vote, but whether it may be *conferred upon other than the corporate authorities*, either with or without a vote. We deny that it can be, and submit that the constitutional limitation is equally disregarded, whether the legislature delegated the power to be exercised, without a vote or with a vote, if it be delegated to any but the corporate authorities.

Second.—It is claimed that said case also holds that it is competent for the legislature to ratify a void election, and give validity to bonds founded upon it.

This question was not in the case. The court held that inasmuch as the bonds were not issued, nor subscription made, until after the enactment and adoption of the charter of February 16, 1857, they were issued under the second section of said charter, and that it authorized the corporate authorities to issue them without a vote.

The point that the election was void, was submitted, but the court say, p. 420: "However it may be, as to the powers of the corporation of Keithsburg, under the act of 1849, it is, perhaps, unnecessary to inquire as these bonds were issued under the act of 1857, to incorporate the town. It was under a special charter, which authorized the president and trustees to subscribe for, and take stock to an amount not exceeding twenty thousand dollars, and issue the bonds of the corporation in payment therefor; and to do all things in relation thereto as natural persons. *Sess. Laws Private Acts 1857, sec. 3, p. 868.* * * *

"There was no necessity to submit the question to the legal voters, as the act grants the power expressly to the president and trustees, the act having been accepted by the corporation as its charter. * *

"The bonds were not issued by the corporation organized under the act of 1849, but under the special charter of 1856. Consequently, all question about the election, or the fairness of it, is foreign to the case. And so is the question as to the power of the legislature to confirm the subscription, if made under the act of 1849.

That case differs from the present in these essential points:

1st. In that case, the announced grounds of the decision are, that the bonds were not founded upon any election, nor issued by a corporation which ever held an election upon the subject.

2d. That the validity of the election there spoken of, and the power of a legislature to affirm a defective or void election, or bonds based upon it, was expressly rejected as foreign to the case, and formed no element in the decision.

3d. The debt was contracted, and the bonds issued under authority expressly conferred upon, and exercised by the corporate authorities of the town.

These differences go to the whole matter of debate, and leave that case no authority upon any point arising in this, and nowise at variance with the rule established by the other cases above cited.

Although the Keithsburg case is decided exclusively upon the grounds aforesaid, yet the court, in delivering their opinion, say, p.421: "That if the subscription made, and bonds issued in June, 1857, were to be regarded as issued under the law of 1849, in pursuance of the said 17th section of the charter of 1857, they are legalized and confirmed by said 17th section.

The reason given for this view is, that the bonds not being issued until after the legislature had conferred power upon the corporate authorities, by the 2d section of act of 1857, to issue them independently of any election.

This, however, was not a decision of any point in the case, and for that reason is not a rule of law, nor a precedent. But this even, when given its true meaning, will be found, like the real point in the case, to be in harmony with the rule that the power to create a corporate debt can be conferred only upon corporate authorities.

This we will endeavor to show, and herein, *of ratification, by subsequent legislation, of defective and void elections, and bonds issued in pursuance of them.*

First.

It is clear that the power to authorize municipal authorities to impose local taxes without any election, carries with it the power to confer that authority by ratifying, or assuming to ratify, any election whatever; and it makes no difference how defective, fraudulent or void the election may have been; for however infirm, it can be no worse than no election. What the legislature has power to do absolutely, it may do conditionally, in any constitutional manner, and may assign any fact it may choose as the ground of its action, and whether that ground be real or imaginary, is immaterial, for none need be given. But the act done must be within its constitutional power, whether it be done by ratifying a former election, authorizing a new one, or without any election. It was so done in the Keithsburg case; and the expressions of the court concerning the 17th section of the charter must be understood as spoken in view of the 2d section also, which in terms conferred the power upon the corporate authorities to issue the bonds without a vote. The real or attempted ratification of a void election can neither give nor take away the constitutional power of the legislature, and is clearly within the right to delegate the power absolutely.

Second.

It has never been claimed that the vote of a municipal corporation, to take stock in a railroad corporation, in the absence of any legislative authorization, was anything but a nullity.

Third,

It is, however, claimed that in all cases where the legislature has power to authorize an election to be held, it may ratify one which has been held without authority.

It is so stated by some courts of good authority, but with all deference, we submit that it cannot be accepted in the broad sense in which we find it stated. Neither in that sense, is it a fair interpretation of the attitude of those courts in whose adjudications the expression is found. Constitutional disabilities may often greatly modify the application of that rule.

When, for instance, the constitution prohibits the municipality from voting to subscribe to the stock of any railroad company, unless it should be first authorized by the legislature to do so, then the legislature could not ratify an unauthorized election without abrogating the constitutional provision.

So when the constitution prohibited the municipality from voting at the same election to subscribe to the stock of more than one railroad company, the legislature could not ratify an election at which a vote was taken to subscribe to the stock of two or more railroad companies, for that would be to nullify the constitutional restriction.

It is equally true, that when the constitution limits the legislature, as to the manner and extent of delegating the power of municipal taxation, it cannot so ratify an election as to transgress the constitutional limitation as to manner and extent. It must be clear that in such cases, as the legislature may ratify elections held without authority, it cannot ratify them *in a manner prohibited by the constitution*, otherwise the legislature might do, by such ratification, what it could not do by direct act.

If the constitution of Illinois inhibits the legislature from delegating the power of local taxation to any but corporate authorities, it equally inhibits it from validating a void or defective election, *in such manner* as to delegate this power to any but corporate authorities. The said act of April 17, 1869, attempts to ratify said election of March 16, 1869, in such a manner as to authorize other persons than the corporate authorities to subscribe for railroad stock, and issue corporation bonds.

The power to create a corporate debt payable by taxation, is power to impose corporate taxes.

People v. *Mayor of Chicago*, 51 Ill. 31.
Livingston v. *Wider*, 530 Ill. 305.

The constitution recognizes the necessity, that the power of local taxation, when delegated, should be exercised by some discreet, responsible and interested body, representing the people to be taxed, with power to decide upon the occasions for its exercise, the conditions upon, and the extent to which it should be exercised, and to determine when the conditions are fulfilled, and to what extent the evidences of corporate liability should be issued.

When the corporate authorities have passed upon the foregoing questions, and decided upon incurring the liability, it is immaterial by whose hand the subscription is made, or the bonds which evidence it, are executed; if it be the mayor, county clerk, supervisor or town clerk, they are merely agents for that purpose, whether named by the corporate authorities, or by the act delegating the power.

As to the bonds involved in this case, the corporate authorities had no means of passing upon any of the foregoing questions, but they are disabled by said act of April 17th, as fully shown hereafter.

Fourth.

It was also urged that the voters of the township assented to the issuing of these bonds, by electing the supervisor and clerk to office after the law had directed them to issue the bonds.

This position is based upon the case of *The People ex rel, &c.* v. *Salomon*, 51 Ill. 37. In that case, corporate authorities are defined to be those corporate officers who are elected by the people, or who are appointed in some manner to which the people have given their assent. The only officers of the corporation then to be taxed were the park commissioners. They were not directly elected by the people, but the law creating that municipal corporation, appointing those officers, and defining their duties, among which was imposing the tax then under consideration, was submitted to the people for their acceptance or rejection, and they voted to accept it. This is held to be an assent to the official character and duties of those commissioners. We accede to the correctness of that ruling.

But a moment's reflection will show that the rule has no application to this case. Suppose the duty of imposing taxes, instead of being vested in officers of the district appointed by the act, were vested in some existing general officer, as in the sheriff of the county, or the member of congress, would it be contended that the people, by voting for those officers, had assented to their acting as corporate authorities, for contracting debts in the name of the county or congressional district? Or must the people refuse to vote, and be without a sheriff or congressman, as their only protection against such taxation?

But, as we understand the matter, the township election, at which the supervisor and clerk were elected in 1869, was held on the first Tuesday of April, being the sixth day of the month, whereas the said validating act, by which alone it became possible for those officers to issue the bonds in question, was passed April 17th, 1869. It can hardly be claimed that by voting for those officers, the people assented to their creating debts under a law that did not then exist.

Fifth.

It has been also urged that as the act of March 9th, 1869, authorizing townships to subscribe one hundred thousand dollars was passed seven days before the election occurred, the election may be treated as held under that act, although upon an insufficient notice and petition, and that, against those defects, the township is estopped by the recitals of the bonds; and, *second*, that said last named act, being in force at the time the bonds were issued, they were valid under the power to issue bonds without any vote being taken.

To the first of said positions, we answer that the act of March 5th, 1867, is the only act providing for holding an election, and the bonds recited that they were issued by virtue of the election held under it. That act required twenty days' notice of such election, and as there were but seven days between the adoption of the act of March 9th and the election, the bonds upon their face therefore, show that if issued in virtue of an election held under that act, they were void for want of legal notice.

To the second position, we answer that the said last named act, in terms, authorizes the additional subscription only under the provisions of the act of March 5th, 1867, and cannot be interpreted as an authority to subscribe without vote as required by that act. But if it be regarded as an authority to issue bonds without vote, then it is at once open to the objection that the authority is not delegated to, nor exercised by, the corporate authorities.

In answer to both of said points, we reply, that said act of March 9, 1869, only authorizes subscriptions of a hundred thousand dollars by townships in which said railroad should be *thereafter* located; whereas, the 12th paragraph of the facts certified to this court, shows that said railroad was located in the township of Elmwood prior to said act.

The act of March 5, 1867, authorizes the town to subscribe and issue bonds for thirty-five thousand dollars, and to hold repeated elections until that amount should be voted. This is a prohibition against subscribing for a larger sum.

The constitution prohibits the legislature from delegating the power of corporate taxation to any but the corporate authorities. The act of April 17th does confer that power upon other than such corporate authorities.

Therefore, we submit that these bonds, upon their face, show that they were first voted under an act which prohibited their issue, and that they were afterwards ratified in a manner prohibited by the constitution, and are void in the hands of all persons for want of power to issue them.

SECONDLY.

The doctrine of the state court is correct on principle, because, *The so-called Validating Act of April 17, 1869, imposes a tax upon a municipal corporation, for corporate purposes, without its consent, and this the legislature has not the power to do.*

First. The adjudications of the state court upon this point are the following:

Marshall v. *Silliman*, 61 Ill. 217.

In this case we claim that the reasoning of the court is unanswerable, and here respectfully submit a part of it.

After quoting said act of April 17, 1869, p. 223, the court say: " This law, if valid, had the effect of creating a debt against the township. It declares that the subscription is binding, and may be collected from the township in the same manner as if it had been legally made. Before the passage of this act, it was not binding, and could not be collected. If it is now binding, it became so for the first time at the passage of this law, and is so solely by force of the law.

"The question, then, whether the subscription is binding does not depend merely upon whether the legislature can pass a retrospective law, but upon whether it can create a debt against a town, and *require the town to assess* a tax for its payment. That this is the real question cannot be denied. It cannot be said that the town has ever consented to the creation of the debt. The so-called vote was an idle form. Persons opposed to the subscription were under no necessity or obligation to vote against it, because they had a right to regard the entire proceeding as a nullity. * * * Neither can the subsequent issue of the bonds be taken as showing the assent of the town. That was the mere ministerial act of the supervisor and clerk, performed in obedience to the act of the legislature.

"We come, then, to the question whether the legislature can create a debt against a municipal corporation for municipal purposes, and subject it to a tax for its payment without its consent. * * * *In Howard* v. *St. Clair and Monroe Levee Drainage Co.*, 51 Ill. 130, we held this clause, sec. 5, art. 9, of the constitution of 1848, was an implied limitation upon the powers of the legislature to grant the right of corporate taxation to any but the corporate authorities. In the subsequent case of the *The People ex rel, &c.*, v. *The Mayor of Chicago*, Ibid. 30, we went further and held that the legislature could not compel a municipal corporation, against its own will, to issue bonds or incur a debt for a merely corporate purpose, like the creation of a public park, or other local improvement. In the last cited case, the precise question under consideration was fully considered, and it is unnecessary to repeat what was there said. See, also, *Hessler* v. *Drainage Commissioners*, 53 Ill. 110, and *Lovingston* v. *Wider*, Ib. 302.

"These cases show it to be the settled doctrine of this court, that under the constitution of 1848, the legislature could not compel a municipal corporation to incur a debt for merely local purposes, against its own wishes, and this doctrine, as already remarked, has received the sanction of express enactment in our present constitution.

"That was the effect of the curative act under consideration, and it was therefore void.

"But even if these two officers (the supervisor and town clerk) could be recognized as the corporate authorities, they cannot be said to have incurred this debt on behalf of the town. The act gave them no discretion. It declared the subscription shall be binding, and may be collected. It did not authorize the corporate authorities to subscribe to the stock or not, as they should think proper, but declared that an illegal vote should be a valid subscription, and left to the town authorities, only the ministerial function of executing the behest of the legislature. * * * *

"Our conclusion is that the so-called curative act was a violation of the constitution. Its object was to compel this town to issue its bonds for railroad stock independently of its own wishes, and this was beyond the limits of legislative power. It sought to accomplish this by declaring that a void proceeding was a legal one; that a vote, confessedly illegal, was in fact, legal. But this vote was an accomplished fact. Whether it was within the corporate powers of the town and binding upon the people, was a question which no subsequent legislature could affect, and when the legislature undertook to say that this vote created a valid obligatian against the town when it did not, it was attempting, by its own act, to create a corporate debt."

In the case of *The People ex rel.* v. *Mayor of Chicago*, 51 Ill. 17, decided June, 1869, where the legislature had enacted that the mayor and comptroller should execute bonds to the commissioners of Lincoln Park to pay the expenses of prosecuting the work of establishing a park for the city, the court held that the corporate authorities of the city could not be compelled, against their consent, to contract debts for local or corporate purposes, and refused a mandamus to compel the mayor and comptroller to issue the bonds.

In *The People ex rel.* v. *The Common Council of Chicago*, 51 Ill. 58, decided June, 1869, where the legislature had enacted that the common council of Chicago should determine upon an amount of bonds to be issued by the mayor and comptroller to the South Park commissioners, to establish a park in the city, the court held that although the city, by its charter, had power to establish and maintain the park, and the corporate authorities had power to issue bonds therefor. Yet the legislature could not power to compel them to do so against their will, and mandamus to compel the commissioners to proceed in the matter was refused.

In *Hessler* v. *Drainage Commissioners*, 53 Ill. 105, decided January, 1870, where the legislature authorized said commissioners to levy and collect a tax upon the lands of the district to be drained, to defray the expenses of the improvement, it is held that the legislature was not competent to confer that authority, without the assent of the people of the district to be taxed.

In *Lovingston* v. *Wider*, 53 Ill. 302, decided January, 1870, where the legislature appointed police commissioners for the city of East St. Louis, and enacted that they might issue and sell certificates of indebtedness in the name of the city, to raise money to defray the expenses of its police force, the court held that these evidences of corporate liability implied the levy of a corporate tax to pay them, therefore the legislature had not the authority to authorize their issue without the assent of the people to be taxed.

Then follows the case of *Marshall* v. *Silliman*, 61 Ill. 118, in September, 1871, decided as above shown, and *Wiley* v. *Silliman*, 62 Ill. 170, decided the same.

The foregoing six cases, with no different ruling, either before or since the decision, certainly establish the doctrine in the state court, upon such a basis that this court cannot, without departing from its uniformly considerate course, overrule it, except for manifestly strong reasons.

Second.

The taxation of a municipal corporation, to pay its subscription to the stock of a railroad company whose road runs to it, is taxation *for municipal purposes.* This proposition has, of course, been much disputed, but upon the theory of its correctness alone, can any such subscription be sustained as lawful, and a uniform course of decisions establish the rule so firmly that we shall assume it will not now be questioned.

The taxation, then, in this case, whether it be *imposed*, or only *permitted*, is for corporate purposes.

Third.

Is the said doctrine of the state court, viz: *That the legislature is not competent to impose taxes upon a municipal corporation, for corporate purposes, without its consent*, correct in principle.

We maintain that it is, and well-nigh self-evidently so.

If it be correct, then the legislature has no right to lay hold of an unlawful and void election, reverse the facts in regard to it by declaring it lawful and valid, and upon that assumption, compel the municipality to tax itself for local and corporate improvements.

We doubt if the absurd position that any power of taxation can be either given or taken away from the legislature, by a void election has ever been assumed by any court. It is solely in consequence of the right of the legislature to confer the taxing power, without an election, that it may confer it notwithstanding a void election. It is idle to affirm that the election which never was, can be made to have been, by retrospective legislation. This is beyond the power of Omnipotence, for it implies a contradiction in the laws of necessity. The most that can be done, by legislative power, is to authorize the election which was not, to be treated as if it had been, and *allow* parties to assume liabilities, based upon that assumption. But it would be gross tyranny, and revolting to every conception of good government, to allow the legislature to enact that a fact existed, which never did exist, and then compel the citizen to adjust his rights accordingly. It is nothing short of alarming, to suppose that there is a power in the land that can enact, that this township elected to contract and pay a corporate debt of forty thousand dollars, when it did not, and then compel taxes to be levied to pay it.

All that precedent will justify, and more, we fear, than is consistent with safety, is that authority may be granted to the municipal corporation to assume that a void election was a valid one; that a fact existed which did not, and *voluntarily* contract debts upon that hypothesis. It is difficult to conceive a license ,more dangerous to the rights of the citizen, than permitting the legislature to enact, that towns and cities have voluntarily assumed heavy liabilities which they did not assume, and, at the same time, cut off all inquiry into the facts, and declare the debt binding and collectible, at all events. We claim that every tribunal in the land, and every good citizen should stand with the State Courts in defeating every attempt at the exercise of such power.

Despotic power lays hands upon the property of the citizens at its pleasure,—free government, only with their consent. No department of our government can afford to remove this barrier between liberty and despotism.

The language of the constitution ought to be decisive of this question. It reads: "The corporate authorities, &c., *may be vested with power* to assess and collect taxes for corporate purposes." This language cannot be interpreted to read: "The corporate authorities *may be compelled* to assess and collect taxes," &c.

It is urged that the legislature may authorize local taxation without submitting to vote. Very well; we only urge that it cannot *compel* it.

It is urged that the legislature might ratify the election. as the *ground* of conferring the power of taxation. Very well; that follows from the power to confer it without an election; but we insist that it cannot *so* ratify the election as to *compel* municipal taxation, instead of *permitting* it.

It is one thing to confer the power to be exercised at discretion, and quite another to exercise it arbitrarily, or to compel its exercise by a mandate. The first the legislature can do, the last it cannot.

To what result would the doctrine we are contesting lead.

Suppose that the project set on foot in the town of Elmwood, instead of being a subscription to the stock of said railroad, had been to take a million dollars of the stock of a company organized to prosecute experiments in establishing ærial navigation between that point and the city of St. Petersburg, and the projectors of the scheme had gotten a few persons together to vote for it, and it carried: can it be held that some future legislature might pick up the absurd transaction, pronounce the election valid, declare the amount voted *binding and collectable* and compel the town to levy taxes to pay it. Is not the citizen entitled to rest upon the fact, that in all courts, as well as in all reason, the proceeding is nugatory and void?

A majority of the voters of the township may have been very willing that the town should subscribe the thirty-five thousand dollars which the law authorized, and very unwilling it should subscribe the forty thousand which no law authorized, and for which it could not make itself liable. They had, therefore, no occasion to attend that election. Or must the voter be ready at all times and places, when and where the farce of a void election is going on, to express, by his vote, his want of confidence in the legislature and in the law courts, lest, at some future day, the one should enact that he had elected to pay, and the other compel him to do it?

The absurd proceeding, aforesaid, is, in all its features, strictly within the rule we are now opposing.

The municipal corporate authorities are, by the constitution, made sole judges of what expenses the municipalities shall incur for local improvements. If the legislature may take this power out of their hands, by validating a void election, it may do so without any election, and direct the corporate authorities what local improvements they shall make and pay for. And, by the same rule, it may omit the corporate authorities altogether, and order such improvements as it may choose, and direct taxation for their payment.

If that doctrine were to prevail, the legislature might declare that the city of Chicago should create ornamental pleasure grounds, fish ponds and skating rinks, amphitheatres and botanical gardens, in the midst of its business centers, and subscribe stock in all the railroads, telegraph and transportation lines coming to the city. It is obvious that no municipality could subsist under that rule.

It has been urged that the state court, in the case of the *People ex rel., etc.*, v. *Mayor of Chicago*, 51 Ill. 30, has held that the legislature has power to impose local taxes upon a municipal corporation without its consent. But it will be seen that the remarks of the court, there found, were not upon any point involved in, or decided by the case, but were made in regard to a supposed instance, in which taxes, nót for municipal purposes, but required for the general good government of the state, might be justifiable in cases of insurrection and the like. The same erroneous construction of that language was expressly repudiated by the same court in *Lovingston* v. *Wider*, 53 Ill. 305.

It has also been urged that this is a question of "Commercial law," and state laws and constitutions must be ridden down before it. We deny that it is a question of that character, but waive the point here. If, however, the rules of commercial law, and the essential principles of good government are found to clash, the former must yield, not the latter. The fundamental doctrines of constitutional liberty cannot be surrendered to any demand of the Law Merchant, "for the life is more than meat, and the body than raiment."

Fourth.

Is the construction put upon said act of April 17, 1869, viz: that it *imposes upon the townships a debt for municipal purposes, without its consent*, a correct one?

We maintain that it is the correct and only construction.

That law affirms 1st. That an election was held in the township of Elmwood, March 16, 1869. Now the so-called election was confessedly null and void in law when held. That which is void in law, does not, in law exist. But all inquiry whether such election was held or not is cut off by the statute. The certificate of the court below shows that an election was held. That fact admitted, it was still without any authority of law, and may have been, in every other respect, grossly fraudulent and void. These are the very points which the corporate authorithies are authorized to look into and decide.

2d. That such an election resulted in a vote, of a majority of the voters of the township, to subscribe forty thousand dollars, more than the law permitted to the stock of the railroad company. All inquiry as to whether this was the fact or not, is cut off by the act. The certificate of the court below also shows that the election resulted in favor of subscription, but that result may have been obtained by fraud and illegal voting. These are the points required to be settled by the corporate authorities.

3d. That said election is legal and binding upon the township. By this provision every possible inquiry into the character and conclusiveness of the election is cut off.

4th. That said forty thousand dollars shall be paid by the township, the same as if it had been authorized by, and subscribed in the manner provided by the charter of said railroad company, when the same shall be subscribed according to the conditions of said vote. By this provision, all inquiry into the liability of the township, upon any ground whatever, is excluded.

Thus all discretion of the township, its officers, or any person on its behalf, is forestalled by this act, *at every point*, from the inception of this indebtedness to its final payment, with the single exception that the supervisor and clerk, in making the subscription, are permitted to accompany it with such conditions as had accompanied the vote. What these conditions were, does not appear, but it seems, from the last clause of the act, that there were some, and the same were allowed to be attached to the subscription.

It will be observed that this clause reserves no discretion, or right to pass upon any of the questions aforesaid, nor to impose any conditions, but simply authorizes the conditions which the void election attached to its vote, to be also attached to the subscription. No point can be indicated, in the whole proceeding where room is left for the township or its corporate authorities, or even its clerk and supervisor, to deliberate and respond *yea or nay*.

Before said act, there was no such debt upon the township. After it, neither the township nor its corporate authorities did anything voluntarily to create it, yet, contemporaneously with the act, and by the force of it, arises a finished liability, binding and collectible, against which there is no defense, if the act imposing it be valid.

Even if the clerk and supervisor could be regarded as the corporate authorities, they did not voluntarily incur the debt, for they had "left to them only the ministerial function of executing the behests of the legislature."

This court has many times announced the rule, that when a state authorizes a municipality to issue its bonds, only upon certain terms and conditions prescribed, and it is made the duty of the municipal authorities to decide when these conditions have been complied with, and issue the bonds, and they do issue them, and recite that the conditions have been fulfilled, proof that any or all of these recitals are incorrect will constitute no defense to the bonds.

St. Joseph Township v. *Rogers*, 16 Wal. 659.

How absurd would this rule be in the present case, where the bonds show that the law by which they were authorized, disabled the officers issuing them from determining any of these questions. The rule implies that these officers must have power to hear and decide them.

The language of the sixth section of this charter is substantially the same as that of the 14th section of the act in the St. Joseph case, which the court hold to vest the supervisor with power to pass upon the holding, result and validity of the election, and be governed by his conclusions as to issuing the bonds. As to the thirty-five bonds actually voted under the charter, the clerk and supervisor doubtless had the same power, but it was altogether cut off by the validating act.

The right to determine whether an election has been held or not, implies the right to inquire whether it was properly notified and fairly conducted, so as to allow an honest expression of the will of the voters, and to reject it altogether, if found corrupt and fraudulent in these particulars.

The right to determine whether the majority voted for the subscription, implies the right to inquire whether the majority was obtained by illegal and fraudulent voting, and to reject it if such is found to have been the fact.

The right to determine whether the election is valid and binding upon the township or not, implies the right to inquire whether there was any law competent to authorize it, as well as all other matters going to its validity, and to refuse to issue bonds, if there is found no lawful authority for holding it, or that it was fraudulent aud void for any reason. The free judgment of the board of corporate authorities, upon these points, is a constitutional safeguard not to be dispensed with. This the legislature has disregarded by ignoring the corporate authorities altogether, declaring the debt binding and collectible and compelling the consequent taxation.

Fourth.

The bearing of the decisions of this court upon the two constitutional questions aforesaid.

This court has held that the state courts have recognized the power of the legislature to authorize municipal corporations to subscribe to the stock of railroad companies, St. Joseph Township vs. Rogers 16, Wal 662.

Of this we make no question. Our objection goes only to the *manner* of authorizing it. We only insist that it cannot be so done as to violate the constitution in the particulars before mentioned; and so the state courts have always held and not otherwise.

It is also held in said St. Joseph case, and others there cited, that the supervisors of a municipality have power to subscribe stock in cases where subscription is authorized.

We make no question but this is a correct rule; but only insist upon the qualification there specified, viz:

"In cases where such subscription has been authorized.

We maintain that the true rule is, that the power must be conferred upon the proper corporate authorities for the time being, with no bands upon their discretion in the exercise of it. And when they have exercised the power, it is matter of indifference by whom the manual act of subscribing stock and signing the bond is done. Our point is, that a person, or persons, cannot be named by the legislature, and authorized, much less directed, to execute the power vested by the constitution in the corporate authorities.

It is also held that legislation, permitting municipal subscriptions to the stock of railroad companies, may be prevented by constitutional limitations, but such legislation will not be held to be in contravention of any implied limitation upon the power of the legislature.

St. Joseph Township v. *Rogers*, 16 Wal. 663;
Rogers v. *Burlington*, 3 Wal. 663.

But in the case before us, the 5th section of article 9, of the constitution is a direct limitation upon the legislature preventing the exercise of the power in the manner attempted by said act of April 17, 1869. And that meaning of the constitution has, by force of anterior decisions of the state court, been made to enter into and form a part of the contracts now in question, as held by this court in the cases before cited.

We submit that the true purport of the rules upon this point, deducible from the decisions of this court, are, 1st, that when municipal bonds are valid under the construction given to the constitution and laws by the state courts, at the time they were issued, they will be held valid still, although the state court has changed its ruling so as to hold them void.

2d. When, by such existing construction, the laws authorizing the bonds were, at the time of their issue, held unconstitutional, the bonds will be held void by this court.

3d. That when the state court, at the time the bonds are issued, has taken no grounds upon the constitutionality of the laws under which they issue, then they bear no badge, of either genuineness or of infirmity, but are taken subject to such construction as the court, in which they are sued, shall give to the constitution and laws of the state, as an original question.

Tested by either the second or third of these standards, the bonds in question are void.

It would be an unblushing logic that should argue that the bonds were stamped with perpetual validity, on account of a construction adopted by the state court which made them valid when issued, and still hold that they would be valid, notwithstanding a like construction which held them void when issued.

Said case of *St. Joseph* vs. *Rogers*, 16 Wal, 644 was relied upon by the plaintiff below more than all other authorities, and as that case may be regarded as the culmination of the doctrines of this court, on the side of sustaining the bonds in question, we beg leave to submit a somewhat careful examination of the case as we view it.

It seems to us, that the case, carries the law upon the points involved in it, to the utmost verge of safety, and that it cannot be pushed further in the same direction.

Our purpose now is to point out particularly the essential differences between that case and the present, in the principles upon which this case rests. In our judgment the resemblance of the two cases is much more apparent than real, while there is between them an impassible gulf of difference.

First, Neither of the constitutional questions above submitted, and upon which this case turns, was either decided or noticed by the court, in that case.

The first mentioned of these questions, being the first ground upon which the bonds were held void by the state court, viz: That said act of April 17, was unconstitutional because it conferred the power of taxation upon the supervisor and clerk, instead of the corporate authorities, was never broached in that case, and of course was not considered or decided.

The other question. viz: That said act *created* a municipal debt instead of *permitting* it, and was therefore void, was incidentally made in the brief of counsel, and the case of Marshall vs. Silliman cited, p. 653. But neither the point made, nor the case cited, were noticed by the court, and it is perfectly clear, from the case as reported, that the question was not in it. And it could not have been regarded as in it, consistently with the grounds taken by the court. The court held, p. 665, that the officer, authorized to issue the bonds, was authorized to pass upon the questions whether an election was held or not, whether a majority voted for the subscription, and whether or not it had become his duty to issue the bonds, and, upon that ground, holds the township responsible for his decision upon these points. Consequently the court could not have considered or decided anything as to the validity of an act, which gives no such discretion, but expressly takes it away.

Second. It was argued that because the case of Marshall vs. Silliman was cited in argument, it must be regarded as revised by this court, and over ruled.

We submit that it is altogether unfair to urge upon this court, that it had decided that the supervisor and town clerk, under the laws of Illinois, are the corporate authorities of a township, or that under the constitution of that state, the power of local taxation might be conferred upon them in disregard of the corporate authorities, upon no other ground than that this court treated them as corporate authorities in a case where no question was made upon the point, and the court had neither expressed nor been invited to express, any opinion upon the subject. And it is altogether erroneous to insist that this court has decided that, under the constitution of Illinois, the legislature may validate a void election in such manner as to take away all discretion from the township or any of its officers, merely because the court has held that an election might be validated which *reserved all these powers to be exercised.*

Furthermore, it is not altogether complimentary to the courtesy of this court, to insist that it has overruled the case of *Marshall* v. *Silliman*, and seven other well-considered cases in the supreme court, to the rule of law, without deigning them the compliment of a notice.

It is not claimed that the other positions, taken upon the construction of said act of April 17th, 1849 have ever been before this court in any form, viz: That it *does* confer the power of municipal taxation upon others than the corporate authorities, and that it *does* impose a municipal tax for corporate purposes without consent.

Third. It is also said that the St. Joseph case holds that a defective election may be validated by a subsequent act ratifying it. That however is not the point we are now contesting. The question to which we *say nay* is, can the legislature *so validate it* as to confer the power of taxing a municipality upon other than the municipal authorities.

Fourth.

But the *main brace*, to support the decision of the court below, drawn from the St. Joseph case, is framed thus: In that case, the act of the legislature of Illinois, upon which the bonds stood for validity, provided that upon a vote being taken in the manner specified as follows: "If it shall appear that a majority of all the legal voters of such towns or townships voting at such election, have voted "for subscription" it should be the duty of the supervisor to subscribe for the amount of stock voted and issue bonds therefor in the name of the townships. That act also provided, "That where elections have already been held, and a majority of the legal voters of any township or incorporated town were in favor of a subscription to said railroad, then no other election need be had, and the amount so voted should be subscribed as in the act provided, and such elections are declared valid as if held under the act. That act was passed February 28, 1867. An election was held on the fourth of August previous, resulting in favor of subscription. On October 1st, 1867, the supervisor, (no other election having been held) subscribed the stock, and issued the bonds. February 28th 1869, the Legislature passed an act providing that any informalities or neglect in keeping or certifying the records of the elections, should not effect the validity of the bonds. Those acts are held sufficient to give those bonds validity in the hands of a *bona fide* purchaser. Therefore, the acts upon which the bonds in question in this case stand, are sufficient to give *them* validity. This we believe is a correct statement of the point for defendant.

We reply that the conclusion drawn from the premises aforesaid, is obviously a *non sequitur*.

The whole point, lies in the difference of the legislation in the two cases. The acts upon which the bonds in the St. Joseph case stands, do not present the question at all, upon which this case turns. They contain the exact validating property, for the lack of which, the acts in this case are void. This we proceed to show.

In that case, the supervisor alone is authorized to subscribe and issue bonds, the clerk being only required to attest them. No question is made, as we have said, but he might constitutionally be appointed to act in lieu of the corporate authorities. The case, consequently, proceeds upon the theory of ascribing to him that power, and in submitting our reasoning upon that case, we put ourselves in the same attitude, although denying its correctness.

Treating the supervisor, therefore, as the corporate authorities, in what position does that act place him? Precisely that which we claim for the corporate authorities in this case, as their constitutional attitude. This appears as follows:

1st. The act in that case, p. 646, secures the *right of determining whether such previous election had been held or not.* This gives the right to examine as to the sufficiency of the notice, time and place of holding, lawfulness of organization, and fairness of conducting it, and to reject it altogether if inadequate or fradulent in these particulars.

The act in the present case cuts off the power of inquiring as to whether an election was held or not, and with it all the aforesaid incidental powers, necessary in determining that fact.

2d. The act in that case, *gives the power to decide whether the result of the vote was, or was not, in favor of subscription.*

This carries with it the power, not only to determine the result of the count, but to inquire into the qualification of the voters, the legality of the voting and manner of conducting, and to reject the election if it be found fraudulent in these particulars.

The act in the present case cuts off every inquiry as to the result of the election, or the means by which it was reached.

3d. The act in that case, *permits* a previous election to be adopted, but does not *require* it. It is therefore discretionary whether such previous election shall be adopted, or a new one held. This gives full power to inquire into the notice, the fairness, passed February 28, 1867. An election was held on the fourth of August previous, resulting in favor of subscription. On October 1st, 1867, the supervisor, (no other election having been held) subscribed the stock, and issued the bonds. February 28th 1869, the Legislature passed an act providing that any informalities or neglect in keeping or certifying the records of the elections, should not effect the validity of the bonds. Those acts are held sufficient to give those bonds validity in the hands of a *bona fide* purchaser. Therefore, the acts upon which the bonds in question in this case stand, are sufficient to give *them* validity. This we believe is a correct statement of the point for defendant.

We reply that the conclusion drawn from the premises aforesaid, is obviously a *non sequitur*.

The whole point, lies in the difference of the legislation in the two cases. The acts upon which the bonds in the St. Joseph case stands, do not present the question at all, upon which this case turns. They contain the exact validating property, for the lack of which, the acts in this case are void. This we proceed to show.

In that case, the supervisor alone is authorized to subscribe and issue bonds, the clerk being only required to attest them. No question is made, as we have said, but he might constitutionally be appointed to act in lieu of the corporate authorities. The case, consequently, proceeds upon the theory of ascribing to him that power, and in submitting our reasoning upon that case, we put ourselves in the same attitude, although denying its correctness.

Treating the supervisor, therefore, as the corporate authorities, in what position does that act place him? Precisely that which we claim for the corporate authorities in this case, as their constitutional attitude. This appears as follows:

1st. The act in that case, p. 646, secures the *right of determining whether such previous election had been held or not.* This gives the right to examine as to the sufficiency of the notice, time and place of holding, lawfulness of organization, and fairness of conducting it, and to reject it altogether if inadequate or fraudulent in these particulars.

The act in the present case cuts off the power of inquiring as to whether an election was held or not, and with it all the aforesaid incidental powers, necessary in determining that fact.

2d. The act in that case, *gives the power to decide whether the result of the vote was, or was not, in favor of subscription.*

This carries with it the power, not only to determine the result of the count, but to inquire into the qualification of the voters, the legality of the voting and manner of conducting, and to reject the election if it be found fraudulent in these particulars.

The act in the present case cuts off every inquiry as to the result of the election, or the means by which it was reached.

3d. The act in that case, *permits* a previous election to be adopted, but does not *require* it. It is therefore discretionary whether such previous election shall be adopted, or a new one held. This gives full power to inquire into the notice, the fairness, the fullness of attendance, the result and all other matters concerning the prior election, and then to adopt or reject, it as a sound discretion may dictate.

The act in the present case compels the adoption of the prior election, with no power to inquire into it, hold another in lieu of it, or reject it.

4th. The act in that case *proposes an optional subscription*, dependent upon an examination of all the points aforesaid.

The act in the present case *declares a debt, and makes it binding and collectible in any event.*

The discretionary power reserved to be exercised, as indicated in the foregoing four points, is exactly what we claim as the constitutional right of the corporate authorities in this case, and, for depriving them of which, said Act of April 17, 1869, is unconstitutional.

The construction which we have above put upon the act cited in the St. Joseph case, is that placed upon it by this court. Upon the effect of the language before quoted from the 14th section of that act, viz: "If it shall appear that a majority of the voters &c.," p. 646, the point is made in the brief of counsel, as follows:

"If it shall appear," says the section. Appear to whom? Evidently to the officer or officers upon whom the State imposes the duty of subscribing for the stock and executing the bonds. If it appeared to the Supervisor of the township that an election had been held, and a majority of the legal voters were in favor of subscription to the railroad, then he had to act in behalf of the town. Some one had to decide when it had become his duty, and no one else, no other officer was authorized to determine this for him. The Supervisor not being authorized, or required to execute the bonds until it should appear that a majority had voted for subscription, it was proper that he should find and recite in the bond the facts that must appear to him, before he could legally act. Such finding, and recital in the bond of his conclusion, would conclude the township for which he was authorized to act, as well as himself, as to whether the required majority had voted.

The Court in deciding the point say: "The fourteenth section of the act makes it the duty of the Supervisor who executed the bonds to determine the question whether a majority of the votes cast were in favor of the subscription, and inasmuch as he has passed upon that question, and subscribed for the stock, and subsequently executed and delivered the bonds, it is clearly too late to question their validity."

This court, therefore, not only held that under that act, the power is reserved to decide all the points aforesaid, but that such questions had been actually canvassed and passed upon. And that fact is made the ground of estoppel against the township.

Treating the supervisor as the corporate authorities in that case, and the supervisor and clerk as the corporate authorities in this case, there then remains this difference between the two cases: The legislation upon which one stands, permits the future holding of an election, or the adopting of a former unauthorized election already held, at discretion, and in either case, reserves the power of passing upon all of the steps taken, the fairness, the result, and the means by which it was reached; and hinges the duty to issue bonds upon the result of an examination of all these points. The legislation in the other, *makes* an election, *makes* a result, *makes* a debt, and *makes* taxes.

One is a *grant of power*, the other a *mandate* to execute it.

It is urged that the St. Joseph case holds that a void election may be validated by a subsequent act ratifying it. The statement is too broad for the facts. It holds that such election may be ratified in the manner disclosed by the facts in that case; that is, in the constitutional method of conferring the power of taxation to be exercised, only at the discretion of the crporate authorities. But there is no warrant for saying that the case holds that a void election may be ratified in a way to impose a tax upon a township for municipal purposes, without its consent. No court has ever so held. The honor of initiating that decision for Illinois yet remains to be won, unless the court below may already claim it.

We submit that in the St. Joseph case, the validation of a void election *is not involved*. This appears as follows:

1st. This court, p. 664, take the obviously correct ground, that the bonds there in question, might be sustained under the power of the legislature to allow the township to make the subscription without requiring a vote.

2d. Giving power to the corporate authorities (and no question is made in that case, that the supervisor might be treated as such) to examine for themselves a former election, and adopt it as a basis of subscription, or hold a new one, is, in no sense, a ratification of such prior election, by the legislature. If it is ratified, in any sense, it is by the act of the corporate authorities, in selecting it as a basis for their action. Therefore the act of February 28, 1867, could take no effect whatever upon the election of August 1, 1866, unless the corporate authorities chose to bring it forward and place it under that act, as the means of indicating the manner of, and extent to which they proposed to exercise the power of taxation. And this is obviously within the right to exercise that power without a vote. Clearly, then, no question is involved as to the power of the legislature to validate a void election, irrespective of the voluntary action of the corporate authorities.

3d. The subsequent act of February 25, 1869, which the court holds valid, does not purport to validate a void election, but only to cure certain specified informalities, in making and transmitting to the county court, the record of an election which the corporate authorities had adoptted. This was no attempt to validate an election, nor to create a liability, nor even to confer a power, but merely to cure insufficient evidences of the exercising of it. This obviously does not touch the question of power to replace a void election with a valid one.

It is well known that railroad companies manipulate the passage of these acts authorizing municipal corporations to subscribe to their stock.

It is obvious that if the legislature has the power to select the supervisor and clerk, and confer upon them the functions of the corporate authorities, in the matter of local taxation, it may select either one of them, or any other member of the board, that can be found favorable to the taxation, and vest him with full power, either with or without a vote, to tax the townships at discretion. No other corporation in the state is left so defenseless, and we cannot conceive it possible that this court should hold that the fifth section of article nine of the constitution so leaves the township.

We challenge the production of any sound reason why, if the legislature may drop the board of corporate authorities, and appoint one or two members of it to exercise its powers, it may not appoint any one or two unofficial third persons, to exercise those powers. The consequences of that doctrine lead only to the wildest and most impossible results.

But to sustain these bonds the court must go further, and hold that the legislature may discard the local authorities, and every other agent, and directly impose a tax upon the township to aid in building a railroad.

If that be the meaning of the constitutional provision, it is, indeed, little credit to its framers, and no protection to the citizen.

It is necessary to go far beyond any existing decision of which we are aware, to sustain these bonds. We know of no case which bridges over the breach of the constitution, in conferring the power of taxing the township upon the supervisor and town clerk, instead of its municipal authorities. But were that passed, we know of no case which bridges over the breach of the constitution, in imposing a tax upon the township, for building this railroad, without its consent.

If the consent of the municipality is rendered necessary by the constitution, then it is clear that the consent must come from its constitutional authorities, and that the legislature cannot appoint special agents, as one member of the board of trustees of an incorporated town, one or two members of the common council of a city, or one or two members of the board of corporate authorities of a township, to give consent for the municipality. That consent is a part of the contract, and must be *given*, not *taken* nor *compelled.*

How shall we escape the conclusion of the state court, *that these bonds are void for want of power to issue them*, on both of the constitutional grounds aforesaid.

We submit that it cannot be done and observe the rules of correct thinking. We may cut ourselves loose from all the lines of just and logical argument, and jump to a different conclusion, but if the light of reason and principle be allowed to point the way forward as we go, and to fall fairly upon the path by which we have come, we claim that the decision reached by the state court is inevitable.

We submit that if these bonds are held valid, then it follows: *That the legislature mag confer the power of municipal taxation upon whoever it pleases, and that it may directly impose municipal taxation for corporate purposes, whenever it chooses.* Nothing is truer than that it can do neither.

If the bonds issued and the stock subscribed were null and void, so was the certificate of stock, and whether it has ever been returned or tendered back to the railroad company is immaterial. Furthermore, the case certified by the court below, shows that this certificate is, and ever has been, of no value.

THIRD.

The decisions of the Supreme State Court, in the cases of Wiley v. *Silliman, and seven preceding cases to the same point, being upon the construction of the constitution of the state, and the validity of statutes enacted under it, should be adopted as the law in this case, by force of the 34th section of the Judiciary Act of September 24, 1874.*

We believe, that from the organization of this court down to the case of *Olcott* v. *Supervisors of Fon du Lac*, 16 Wal. 678, decided in 1872, the doctrine of this court has been uniform, that the adjudications of the highest state courts, *upon the meaning of the constitution or state statutes*, will be adopted by the Federal Courts as rules for their own judgment.

We believe that doctrine has never been productive of any ill, but has contributed largely to national harmony, and inspired mutual respect and self-respect in both state and national courts. It is a question not unworthy of the dignity of this court to consider whether like favorable consequences can result from a departure from it.

We do not, however, propose an exhaustive dicussion of this question.

In the case of *Olcott* v. *Supervisors, &c.*, the court is strongly urged by one party, to stand by its uniform practice of adhering to the decisions of the state court in questions concerning the construction of its constitution and laws, and by the other, to depart from it, and announce the doctrine that this court will disregard the decision of the state courts upon that class of questions, at pleasure. But this court takes neither course, but holds that the supreme court of Michigan had mistaken the nature of the question involved, in treating it as a constitutional question. The court declines to disturb the foundations of the old rule, saying that it is undoubtedly true, that this court follows the decisions of the state courts in respect to the construction of their own constitution and laws. But in regard to the decision of the state court then under consideration (*Whiting* v. *Fon du Lac*, 25 Wis. 188), in which the bonds under consideration had been held void, the court say: "The question considered by the court was not one of interpretation or construction. The meaning of no state constitution was considered or declared. What was considered, was the uses for which taxation, generally, by any government, might be authorized, and, particularly, whether the construction and maintenance of a railroad, owned by a corporation is a matter of public concern."

But the chief ground upon which the bonds were sustained in that case, was, that prior to their issue, the state court had made repeated decisions sustaining the principles of law upon which they rested, and that the contrary doctrine held in *Whiting* v. *Fon du Lac*, adopted after they were issued, would not be followed by this court.

The case of *Township of Pine Grove* v. *Talcott*, 19 Wal. 666, decided in October, 1873, goes further, and holds that this court is at liberty to revise the decision of the state court in regard to the constitutionality of laws under which bonds have been issued, made subsequently to their issue, in a case where the state court had made no decision upon the point, prior to their issue.

That decision is placed expressly upon the ground, p. 677, that " When the bonds were issued there had been no authoritative intimation, from any quarter, that any such statutes were invalid.

We apprehend it will not be claimed that any case goes so far as to hold, that when the state court has put a construction upon its constitution, before the bonds are issued, by which the law authorizing their issue is held unconstitutional, this court will then reconsider the decision. And that is the case with the bonds in question, as we have before shown.

2d. The Judiciary Act provides that the laws of the several states shall be regarded as the rules of decision in trials at the common law in the United States Courts, in cases where they apply.

The practical question is, therefore, *when do they apply?*

Down to the case of *Township of Pine Grove* v. *Talcott*, we believe the rule has been uniform, that they did apply in all cases of decisions made by the highest state courts, in the construction of its constitution and laws. When the state courts have made conflicting decisions upon these questions, this court has, at least since the case of *Gelpick* v. *Dubuque*, 1 Wal. 175, elected which of these decisions it would follow, and chosen the one which prevailed at the time the contract was made. In the Pine Grove case, however, this court declined to follow the only decision of the state court upon the point, it being made after the bonds were issued.

The principal reason given for this departure is, that a question of *commercial law* was involved, and such questions belong to the domain of general jurisprudence.

If it be a question of commercial law, in which "commercial securities are involved," it is difficult to see why that fact draws after it, the conclusion that the decision of the state courts, as to whether the contracts ever had any validity, when tested by the constitution and state laws, should be disregarded by this court, any more than like decisions concerning contracts touching agriculture, mechanics or manufacture. Why should the peculiar class of business to which the contract belongs, determine the authoritive character of the decision of the state court, as to whether it is valid or void under its constitution and laws?

When one citizen of New York comes to this court to seek remedies under a title bond, made in Illinois, and which came to him by assignment, and another comes with a railroad bond, which came to him by delivery, if both contracts depend, for validity, upon statutes which the state court had held unconstitutional since the contracts were made, why should one be told that the court will be bound by that decision, and denied a remedy, and the other be told that the court will not be bound by that decision, but will reconsider and revise it, and give a remedy?

It if easy enough to reply that is is because one contract involves a rule of property, and the other a rule of trade. This reason, however, seems altogether artificial and inadequate. Both contracts were made in the state, between citizens of the state, under the laws of the state, and, to be enforced according to the laws of the state. No non-resident was under any obligations to take them; but if he chose to do so, why should he be exempt from the judgment of the state courts as to their validity under the constitution of the state. This is only determining what the law was when they were issued.

We submit that in cases like the present, where the state court has put a construction upon the constitutional powers of the legislature, which settles the validity of municipal bonds, and does so after the bonds were issued, but before this court had put any construction upon it, the decision of the state court should be followed by this court.

3d. With all deference to the opinions already expressed upon the subject, we submit this inquiry.

Is it quite clear that the question, whether municipal bonds are valid under the constitution and laws of the state where they are issued *is a question of commercial law.*

It is not every question touching negotiable paper, which is a question of commercial law.

That large body of unwritten rules of trade and business, known as the Law Merchant, with such modifications as it has received in different localities, by positive enactments, is, we suppose, what is meant by commercial law.

We submit that no question concerning the validity of a municipal bond *ab initio*, can be a question of commercial law.

The mucicipal bond is a foreigner to the Law Merchant. It is not born in it nor of it. It does not originate in the usages of trade and commerce, but is a creature of positive law — of statutory authority. Its existence, everywhere, points directly back, not to the Law Merchant, but to legislative enactments and constitutional powers, for its very being.

Upon the question of its existence, or the rules which govern its creation, the Law Merchant has no precepts whatever.

When the bond has established an actual existence, then, by virtue of its negotiable character, it takes its place as commercial paper, and is governed by rules of the commercial law. But the question whether it ever was a bond, whether it is *paper* at all, in the commercial or property sense, is not, as we claim, a question of commercial law.

The question whether a prommissory note, or bill of exchange, is a forgery or not, is not a question of commercial law. Whether it was obtained by duress, or made by an infant, lunatic or married woman, are not questions of commercial law, although they relate to commercial paper and affect commercial securities.

It is not within the province of the law merchant to determine what paper was originally genuine and valid. It takes no notice of any paper until it has passed that stage, and enters into commercial transactions, then it subjects it to its own rules and policy. But the moment the paper is remitted back to the question, whether it was originally valid or void, it is no more within the purview of the Law Merchant than of the Canon Law or Martial Law.

So all questions, whether there was adequate prior legislation, or subsequent ratification, to authorize municipal bonds to be issued, or whether there was adequate constitutional authority for the legislation, are matters which go to the question whether there ever was a bond or not, that is, to its original validity, and are not, in our judgment, questions of commercial law.

We submit that for this reason also, the decision of the state court, holding said bonds void, is entitled to be adopted as the law of this court.

4th. We maintain this further ground upon this question.

A manifest distinction is to be taken between those cases in which the state court, in a suit upon other bonds than those before this court for its judgment, has adjudicated that the acts upon which they are based, are unconstitutional, and a case in which the state court has adjudged that the identical bonds upon which the suit is brought in this court are null and void.

The state courts and the federal courts have concurrent jurisdiction in the matter of adjudicating upon these bonds in the hands of the plaintiff below. Courts of concurrent jurisdiction are courts of equal grade and authority as to the matters in which their jurisdictions concur. Courts of concurrent jurisdiction have no jurisdiction to review and revise the decisions of each other. There can be no judicial subordination between courts of concurrent jurisdiction. It is only when error or appeal lies from one court to another, that one may lawfully review the rulings of the other.

It is obvious that when two or more courts have concurrent jurisdiction to determine the validity of the same contract, and that court, whose action is first lawfully invoked, passes final judgment upon it, its decision, must be followed by the other courts.

Otherwise co-equal courts would be deciding the same question differently, one holding that the contract should be enforced, the other that it should not. As there is no arbitrator between them, it would result in a mere question of force as to whose decision shall be executed. This consequence would not result from judgments which are not upon identically the same contract although they may be upon exactly similar ones.

The identical bonds and coupons which the court is asked to enforce by this suit, have, by the final judgment of the state supreme court been held to be void contracts. True, the plaintiff below was not a party to that suit. But it is not a question whether he is estopped by the record in that case, so that former adjudication, might have been pleaded in abatement. But the inquiry is, how does that judgment affect the court, as the adjudication of a court of concurrent jurisdiction?

We submit that the proper inquiry before this court, upon this point, is not who were the parties to the suit in the state court, but was the jurisdiction of that court properly invoked and lawfully exercised? Did any person, having the right to do so, lawfully put the question of the validity of these bonds to issue before that court, and has it lawfully adjudicated upon their validity. If the question of the validity of these bonds has become *res adjudicata* in that court, it matters not at whose suit it occurred. It then stands in the attitude of a decision of a court of jurisdiction, concurrent with that of this court, upon the exact questions, the identical contracts and subject matter before this court. We claim, therefore, that it is the duty of this court to adopt that decision as a prior judgment in the case, as much as if it had been rendered in this court, and to bring its effect home to all persons who sue upon those contracts in this court, by making it the judgment of this court.

It is true that if the court were to adopt the settled decision of the state courts, in regard to the construction of the constitution, in all cases, it might be sometimes called upon to enforce rules which its judgment does not approve. But this court is constantly enforcing state statutes and constitutional provisions, and federal statutes also, to which they would not have given their assent had they been the law makers. Juch provisions are enforced because they are the law, not because the court approves them.

In *Christy* v. *Priageon*. 1 Wal. 196, it is held that the interpretations within the jurisdiction of the state of a local law, is as much a part of the law as if incorporated in it by the legislature.

The court might also be called upon to decide similar cases differently, on account of the different holdings of the state courts upon similar, or the same questions. All these objections have been urged upon the court, but they result from the fact that the different states have made the law differently, and that it is the province of the court to enforce the law, not to make it. The authority last cited fully meets the emergency. It is there held that if different interpretations are given in different states, to the same law, that law, in effect, becomes, by the interpretations, so far as it is a rule of action for this court, a different law in one state from what it is in another.

For the reasons above submitted, we maintain that the said decisions of the state court, holding said bonds void, ought to be adopted as the law in this case.

II.

The bonds in question are void, for the reason that they show upon their face that they were issued in violation of the acts which purports to authorize them.

Said sixth section of the charter of said railroad company, enacts that upon vote being taken to subscribe to the stock of said company, the supervisor and town clerk shall issue and deliver to said company, the bonds of said town, "payable at any time specified, *not exceeding twenty years from the date.*"

The bonds bear date, and were actually issued and delivered on the 27th day of April, 1869, and are made payable on the 1st day of July, 1889. They are, therefore, payable more than twenty years from their date and delivery. (See second and eighth specification of the certificate of division.)

The Superviser and clerk are expressly prohibited by the act from issuing any bonds payable more than twenty years from date.

If they might exceed the prohibition of the statute by two months, so they might by two years, or ten. And if the bonds are valid running twenty years and two months, they would be equally so if running thirty or fifty years. If these bonds are to be sustained as valid, then it follows that under the limitation of the act, the supervisor and town clerk might exercise an unlimited discretion as to the time the bonds should run. The breach of the power is shown upon the face of the bonds, by reference to the act referred to by it. The bonds issued are not the bonds authorized by the act.

We claim, therefore, that the bonds are void for the lack of power to issue them, payable more than twenty years from date.

The foregoing views are respectfully submitted on behalf of the plaintiff in error.

H. B. HOPKINS,
J. H. MORRON,
Of Counsel for Plaintiff.

IN THE

SUPREME COURT

OF THE UNITED STATES,

Of the October Term, A. D. 1875.

TOWN OF ELMWOOD,
Plaintiff in Error,
—vs.—
GEORGE O. MARCY,
Defendant in Error.

Writ of Error to Northern District of Illinois.

BRIEF AND ARGUMENT

—OF—

ISAAC G. WILSON AND SANFORD B. PERRY,

For Defendant in Error.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.
1876.

In the

SUPREME COURT of the UNITED STATES.

Of the October Term, A. D. 1875.

Town of Elmwood, Plaintiff in Error,

vs.

George O. Marcy, Defendant in Error.

Writ of Error to Northern District of Illinois.

BRIEF AND ARGUMENT

—OF—

ISAAC G. WILSON, and SANFORD B PERRY,

For Defendant in Error.

CHICAGO:
LEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.
1876.

STATEMENT OF FACTS.

This was an action brought in the Circuit Court of the United States for the Northern District of Illinois, by George O. Marcy against the Town of Elmwood, to recover the amount due upon interest coupons attached to bonds issued by the town, which were placed upon the market for sale, and purchased before maturity, by the plaintiff below, in the usual course of his business, for full value paid by him therefor, and without notice of any infirmity, or ground of defense to the bonds.

By the written stipulation of the parties, a jury was waived, and the case was tried by the court without the intervention of a jury, on the 28th day of July, A. D. 1875, before the Circuit and District Judges sitting together, when the following order and judgment were entered :

" And the Court, after hearing the evidence, and the " argument of counsel, the Circuit Judge finds the issues " for the plaintiff, and, by his direction, it is ordered that " judgment be entered herein in the sum of four thousand " two hundred and five dollars and ninety cents, as damages herein, to which finding the District Judge dissents." (See page 9, printed Record.)

[Then follows the certificate of division of opinion of the judges. See pages 10, 11, 12, 13 and 14, printed Record.]

The defendant below brings the case into this Court for review, upon a writ of error.

The defendant in error submits as preliminary to the main argument in the case, that, under the acts of Congress, this court has not jurisdiction to re-examine and determine the case upon writ of error, the amount of the matter in dispute being less than five thousand dollars.

Section 691 of the Revised Statutes of the United States, page 128, Chap. 11, Title *Jurisdiction*, provides that "all final judgments of any circuit court, in civil actions, * * * * when the amount in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, may be re-examined, and reversed or affirmed in the Supreme Court, upon a writ of error."

By the act of Feb. 16, 1875, which went into force May 1, 1875, the amount was raised from two thousand to five thousand dollars. (Page 315, Acts of Congress, 1874 '75.) The act provides negatively in general terms, that "such "judgments and decrees shall not be re-examined in the "Supreme Court, unless the matter in dispute shall ex- "ceed the sum of five thousand dollars."

Section 693, Rev. Stat., page 193, provides that:

> "Any final judgment or decree, in any civil suit or proceeding before a circuit court, which was held at the time by the circuit judge and a district judge, wherein the judges certify, as provided by law, that their opinions were opposed, upon any question which occurred on the trial, or hearing of said suit or proceeding, may be reviewed and affirmed or reversed, by the Supreme Court on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error, or appeals, in regard to bail or supersedeas."

In the present case, the judgment is less than five thousand dollars, and was a final judgment, rendered in the Circuit Court since the act of Feb. 16, 1875, went into force.

The defendant in error contends that the act of Feb. 16, 1875, is a general limitation, and applies to all cases of final judgments in civil suits tried in the circuit courts of the United States. That it was designed, as its title expresses, "to facilitate the disposition of cases in the Supreme Court," by limiting writs of error and appeals to cases in which the judgment exceeds the sum of five thousand dollars.

It is true, the particular section providing for a review of cases on a certificate of division, does not contain the five thousand dollar limitation clause. The object of that section was to provide generally for a review upon certificates of division, in cases where there has been a *final hearing*, leaving the subject of limitatation as to amount from which a writ of error will lie, to be provided for in other sections, as Congress might deem best. And accordingly, we find another section, quoted above, limiting the amount in all cases, to five thousand dollars, with a few exceptions, which are specifically provided for, where writs of error may be brought, without regard to the amount in controversy. These are:

1st. Cases touching *patent rights* and *copyrights.*

2d. Actions brought by the United States for the enforcement of the *revenue laws.*

3d. Actions against any *officer of the revenue*, for wrongful acts done by him.

4th. Cases brought for the deprivation of any *right, privilege*, or *immunity*, secured to the citizen by the Constitution of the United States. And

5th. Civil actions brought by any person on account of injury done to his person or property, in certain cases of *conspiracy.*

These are the only exceptions, so far as we are aware. And we claim that the enumeration by Congress of these excepted cases is the exclusion of any others.

Were the Court to hold that the five thousand dollar limitation does not apply to cases brought upon a certificate of division, because it is not mentioned in the same section which provides for cases of certificates of division, let us see what would be the result.

Section 700 of the Revised Statutes, page 130, provides that " when an issue of fact is tried, and determined by " the court, without the intervention of a jury, according to " section 649, the rulings of the court in the progress of the

" trial of the cause, if excepted to at the time, and duly pre-
" sented by a bill of exceptions, may be reviewed by the
" Supreme Court, upon a writ of error, or upon appeal."

Now, if the fact that the five thousand dollar limitation is not contained in the section last quoted, excepts that class of cases from any limitation as to the amount in controversy, it would follow that in every case tried by the circuit court without a jury, a writ of error would lie from a judgment, though it might not amount to a hundred dollars. Certainly no lawyer would insist upon such a construction. We might refer to other illustrations, equally showing the absurdity of the construction.

In the present case, there was a final judgment, which it was competent for the circuit judge to render; the amount is less than five thousand dollars; there is a general statute prohibiting the Supreme Court from reviewing cases, where the amount is less than that sum, and the case does not come within any of the exceptions to the general provision of the act of Congress in relation to the five thousand dollar limitation. It is respectfully submitted that the writ of error ought to be dismissed, for want of jurisdiction.

II.

As to the case itself:

On the 5th of March, 1867, the legislature of the State of Illinois passed an act incorporating the Dixon, Peoria and Hannibal Railroad Company. The sixth section authorized townships through which the road might pass to take stock therein, not exceeding $35,000 for each township.

The question was to be submitted to a vote of the people, which was to be taken upon a petition, signed by twenty-five legal voters, being presented to the supervisor.

The town clerk was to give twenty days' notice of the time and place of holding the election.

The act is found on page 604, Vol. 2, Private Laws, 1867, and so much of the act as is necessary to be quoted, is as follows:

> " SECTION 6. The several counties in which any part of said road may be located, and the several townships in said counties which may have adopted township organization, are hereby authorized to subscribe and take stock in said railroad company.
>
> Elections may be held in any such county, township, etc. upon the question, whether such county, township, etc., shall subscribe for any specified amount of the stock of said company, not exceeding one hundred thousand dollars for each county, and not exceeding thirty-five thousand dollars for each of such townships, &c. * * * Whenever a petition shall be presented to the supervisors of any such township, signed by twenty-five legal voters of any such township, setting forth the amount of stock proposed to be taken by any such township, and specifying the time for holding such election, it shall be the duty of the clerk to give twenty days' notice of the time of holding such election. * * * If a majority of the votes actually cast at any such election shall be 'For Subscription,' it shall be the duty of the supervisor and clerk of any such township to subscribe without unnecessary delay upon the request of said company, for stock in said company, to the amount mentioned in such petition, and to issue and deliver to said company the same amount as the stock so subscribed, of the bonds of such township, payable at any time specified, not exceeding twenty years from their date, with interest, at a rate not exceeding ten per cent. per annum, payable annually."

SECTION 7 makes it the duty of the respective authorities of counties, towns, etc., to levy and collect a sufficient special tax to pay the annual interest, and to liquidate the principal at maturity.

On the 9th day of March, 1869, the legislature passed an act entitled

" An act to amend the charter of the Dixon, Peoria and Hannibal Railway Company, which is found on page 283, vol. 3, Private Laws, State of Illinois, and is as follows: ‘That an act to incorporate the Dixon, Peoria and Hannibal Railroad Company, approved March 5th, 1867, be so amended as to authorize the several * * * townships to subscribe or make donations under the provisions of said act to the capital stock of said company in any amount not exceeding one hundred thousand dollars for any such township.’”

The act took effect from and after its passage.

On the 11th day of February, 1869, a petition signed by thirty-one legal voters of the town of Elmwood was presented to the supervisor of the town, asking that an election be called in pursuance of the provisions of the charter of the railroad company, to be held March 16, 1869, for the purpose of deciding by ballot whether the township would subscribe $35,000 to the capital stock of said railroad company, and issue the bonds of the township in payment for the same in the manner provided by said charter. (Printed Record, page 12).

In pursuance of said petition, an election was duly called, and held on said 16th day of March, at which there was a majority of 205 in favor of the subscription. (Record, page 12).

On the 16th day of February, 1869, the supervisor, town clerk, two justices of the peace, and twelve freeholders of said township, filed in the office of the town clerk a petition requesting that a special town meeting of the legal voters of the town be called to determine by ballot whether said town will subscribe for the capital stock of said Dixon, Peoria and Hannibal Railroad Company to any amount, and if so, to what amount, over and above the $35,000 authorized by the charter of said Company, and in reference to which a meeting of said legal voters has also been called.

In pursuance of said last named petition, an election was notified by the town clerk on the 16th day of February, 1869, and was holden on the 16th day of March, 1869, being at the same time and place with the election first called, and held as above stated, which said last named election also resulted in the same majority, 205 votes, in favor of an additional subscription of $40,000 to the capital stock of the company, over and above the $35,000 authorized by the original terms of the charter. (Printed Record, pages 12, 13).

On the 17th day of April, 1869, a month after the election, and ten days before the bonds were issued, an act of the legislature was passed, which is set out in full on page 13, printed Record, and is as follows:

> " That a certain election held in the township of Elmwood, in Peoria county, on the 16th day of March, 1869, at which a majority of the legal voters in said township, in special town meeting, voted to subscribe for and take $40,000 of the capital stock of the Dixon, Peoria and Hannibal Railroad Company, over and above the $35,000 which was on the same day subscribed for and taken in accordance with the charter of said company, is hereby legalized and confirmed, and is declared to be binding upon said township; and the said $40,000 when subscribed according to the conditions of said vote, may be collected from said township in the same manner as if the said subscription had been made under the provisions of said charter.
>
> SECTION 2. This act shall be declared a public act, and shall take effect and be in force from and after its passage."

On the 27th day of April, 1869, the supervisor and town clerk issued and delivered to the president and secretary of said Railroad Company, the bonds of the township to the amount of $75,000, with coupons attached for the annual interest thereon, in payment for the capital stock of said company, subscribed and taken in pursuance of both the elections aforesaid. (Printed Record, page 13).

The coupons in suit are a portion of the above named coupons.

Before the commencement of this suit, said coupons were presented for payment at the office of the State Treasurer, at Springfield, Illinois, and also to the supervisor of the town, but payment thereof was refused. (Printed Record, p. 13.) The bonds are as follows:

"UNITED STATES OF AMERICA, }
State of Illinois: Elmwood. }
Number.... Dollars, 1,000.

TOWNSHIP RAILROAD BONDS.

"Know all men by these presents, that the township of Elmwood, in the county of Peoria and State of Illinois, acknowledges itself to owe and be indebted unto the bearer hereof the sum of one thousand dollars, payable on the 1st day of July, A. D. 1889, with interest thereon at the rate of ten per centum per annum, payable annually on the 1st day of July in each year, at the office of the State Treasurer, in Springfield, Illinois, upon presenting and delivering of the proper coupons hereunto annexed, until the payment of the principal sum.

"This bond is issued under and by virtue of a law of the State of Illinois, entitled: 'An act to incorporate the Dixon, Peoria and Hannibal Railroad Company,' approved, March 5th, 1867, and amended and approved March 9th, 1869, and also in virtue of an act entitled, 'An act to legalize a certain election therein named,' approved April 17th, 1869, authorizing the several townships, cities or incorporated towns in the counties through which the road may be located, to subscribe and take stock in the Dixon, Peoria and Hannibal Railroad Company, to an amount not exceeding one hundred thousand dollars to each township, city or incorporated town, and to pay for the same in the bonds of said township, city and town, coming due twenty years from the date of their issue, and bearing interest at a rate not exceeding ten per cent. per annum, payable annually, and in accordance with the vote of the electors of said township, at the special election, held March 16th, A. D. 1869, in accordance with the provisions of said act; and the faith of the township of Elmwood is hereby pledged for the payment of the principal sum, and interest thereon, as aforesaid.

"In testimony whereof, the supervisor and clerk of said township of Elmwood have subscribed this bond this 27th day of April, A. D. one thousand, eight hundred and sixty-nine.

"L. F. JONES, *Supervisor*.
"S. M. FARRAR, *Town Clerk*."

Upon the receipt of the bonds, as aforesaid, the president and secretary of the Railroad Company delivered to said supervisor and town clerk a certificate of the capital stock of the company for the amount of $75,000, the amount of said bonds, and the same has not been returned or tendered back to said town of Elmwood.

The railroad was, after the passage of its charter by the legislature, located in said town of Elmwood prior to said elections and township organization was adopted in said town prior to the date of the passage of the charter of said Railroad Company.

The Circuit Court found the issues for the plaintiff below, and entered judgment against defendant, the plaintiff in error here, for the sum of $4,192.90.

From this summary of the facts, it will be seen that two elections were held on the same day, March 16th, 1869, the one pursuant to the first call of February 11th, the other under the call of February 16th, 1869. That under the first call $35,000 was voted, and under the second, $40,000, making the aggregate of $75,000, for which the bonds were issued. *That at the time of these two elections* there was an existing provision in the original charter of the company authorizing the subscription of $35,000, and also an existing law contained in the amendment to the charter, passed March 9, 1869, authorizing an additional subscription of $65,000.

Thus there *was competent legislative authority for both subscriptions*, at the time the elections occurred, at which they were voted.

It also appears that on the 17th day of April, ten days before the bonds were issued, the legislature passed an act validating the election which was called on the 16th day of February, 1869, at which the additional $40,000 was voted, and declaring that "said $40,000 when subscribed according to the conditions of said vote may be collected from "said township in the same manner as if the said subscription had been made under the provisions of said charter."

ARGUMENT.

We have not been furnished with any argument or points on the part of the plaintiff in error, and shall therefore assume that they will be substantially the same as were presented in the court below.

The ground of objection urged against the validity of the bonds in question was that the act of April 17th, 1869, had been declared unconstitutional and void by the State court, upon two grounds:

First. Because the law itself *creates a debt* against the town for corporate purposes, and directs its payment without the consent of the people of the township.

Second. Because it attempts to confer the taxing power upon other than the "corporate authorities" of the municipality.

It was claimed that these objections occupy the attitude of judicial decisions of the State court in relation to its own laws, and are of a local character, and, therefore, are obligatory upon this court.

If these claims were true, in fact and in law, we should readily admit the invalidity of these bonds.

There is no pretense that the legislature has power, by the mere passage of a statute, to *create a debt* against a municipality. Nor have we ever claimed that it may confer the taxing power upon any other than the corporate authorities. The limitations upon the legislative power, in this regard, are well understood, and have been settled by repeated adjudications. We concede, at the start, that if the acts under which the bonds in question were issued, can, in any just sense, be construed as creating a debt, or as conferring the power of taxation upon any other than the *corporate authorities*, the case is at an end.

But we deny that any such construction can be rightfully put upon the act in question, and we deny that as to a *bona fide* purchaser of the bonds, the act was necessary, the town being authorized by the charter and amendatory act of March 9th, 1869, to issue bonds of this character.

(1.) It will not be claimed that the provisions in the original charter of the railroad company authorizing townships to subscribe for $35,000 of the stock upon a vote of the people, created a debt, or affected, in any way, the subject of the taxing power.

(2.) And certainly, the act of March 9th, 1869 produced neither of those results. Its simple and only office was to increase the amount of stock which the town might subscribe, if they should elect by vote to do so, from $35,000 to any amount not exceeding $100,000.

(3.) Did the act of April 17th, 1869, *create a debt*, or confer the taxing power upon other than the corporate authorities of the town ? Was that the intention of the legislature in passing it ?

Obviously the design of the act was only to cure certain irregularities which had occurred in the call and notice of the election at which the additional $40,000 was voted.

It was seen that although there was an existing law at the time of the election, authorizing the township to subscribe the additional $40,000, and notwithstanding the people had, under that law, voted to subscribe the additional $40,000; yet, that certain irregularities had occurred, which it might be well to cure before the bonds should be issued and put upon the market. The call had been irregular. It was made by the supervisor, town clerk, and twelve freeholders, after the manner of calling special town meetings, while it should have been made by a petition of twenty-five legal voters presented to the supervisor, as directed in the charter of the railroad company. Though more than twenty days' notice had been given of the time and place of holding the election, it was not until after a portion of this time had run that the law authorizing the additional $40.000 had been passed.

To cure these irregularities, the act of April 17th, 1869, was passed. Was such an act within the competency of legislative action ?

We respectfully submit that the question is scarcely debatable, and we shall endeavor to show: *First*, that the case of *Marshall et al.* v. *Silliman et al.*, decided by the Supreme Court of Illinois, (61 Ill., 218), is not only in conflict with its former adjudications, and the decisions in other States, but is in direct opposition to the adjudications of this court; and, *secondly*, that it is among the class of cases in which the decision of the State court is not binding upon this court.

The power of the legislature to pass retrospective statutes *where they do not interfere with existing rights, and there is no constitutional prohibition against retrospective legislation*, is too well settled to require the production of authorities. There are, we believe, only three States whose constitutions, in terms, forbid retrospective laws. These are, New Hampshire, Ohio and Tennessee. The constitutions of all the rest have subtantially the same clause that the constitution of the United States contains, namely: "No *ex post facto* law, nor any law impairing "the obligation of contracts shall ever be made." The word *retrospective* is not used in the constitution of Illinois, and laws of that character are not prohibited, *unless they affect injuriously existing rights, or impair the obligation of contracts*; and in all the States, except the three above named, retrospective legislation has been sustained by the courts whenever the question has come before them.

Sedgwick, in his valuable treatise on statutory and constitutional law, says:

"There is, indeed, a large number of cases in which "appeals are made for legislative relief or assistance, in "which it would be very injurious to assert the doctrine

" that the legislature is incompetent to pass laws having a " retroactive effect. Such are laws declaring valid acts of " official persons irregularly elected, amending charters of " incorporated companies, correcting assessment rolls ir- " regularly made, extending the time for collection of " taxes, or for reports required by law, altering and " amending judicial procedure. In these, and many other " cases, it is difficult to avoid giving the acts of the legis- " lature a retrospective effect, and every such effect must " or may influence injuriously some individual case. But " the interests of the community are paramount."

Cooley, on Constitutional Limitations, page 379, says:

" We have already referred to the case of contracts by " municipal corporations, which, when made, were in ex- " cess of their authority, but subsequently have been con- " firmed by legislative action. If the contract was one " which the legislature might originally have authorized, " the case falls within the rule we have laid down, and the " legislative action is to be sustained. *Some of the cases " where municipal subscriptions in aid of railroads were " held valid, were cases where the original undertaking was " without authority of law, and was confirmed by retro- " spective legislation.*"

In the State of Illinois, retrospective and curative statutes have been so often enacted, and so uniformly sustained by the decisions of the Supreme Court, whenever they did not interfere with existing rights, as to no longer leave the power of the legislature to pass them, an open question.

And in the case of *St. Joseph Township* v. *Rogers*, 16 Wall., 666, which was a case where the election at which the subscription was voted, was held *before the passage of a law authorizing a subscription*, this court said: " Argu- " ments to show that defective subscriptions of the kind " may, in all cases, be ratified when the legislature could " have originally conferred the power, is certainly unneces-

" sary, as the question is authoritatively settled by the Supreme Court of the State, and of this court, in repeated " instances."

We might crowd our brief with numberless similar authorities, if it were necessary. They establish, as a principle, the doctrine that, whenever a case is presented to the legislature, in which it could originally have conferred the power to subscribe, it may, by a curative act, ratify a subscription made under an imperfect or defective execution of a power already conferred.

III.

But it is claimed that the act of April 17th was a statute compelling the township to create an obligation, and tax itself *without its consent*.

That such a construction is a false one, is apparent from the phraseology of the act itself. The language is: " *That* " *a certain election, held in the township of Elmwood, on the* " 16*th day of March, in which a majority of the legal voters* " *in said township voted to subscribe for and take forty thou-* " *sand dollars of the capital stock, &c., is hereby ratified and* " *confirmed*."

Can a statute, couched in such phraseology as this, be said to be an act to compel the town to undertake an obligation against its consent? It is, on the contrary, a legislative recognition, and a recital of the fact, that the town had already held an election, at which it had *expressed its assent* to the proposition to subscribe for $40,000 additional stock, and is an enactment that that expression should be a valid one. The recital contained in the act was true. An election had been held. At the time when it was held there was an existing law authorizing the town to make the subscription, and the electors, by a large majority, had voted in favor of it.

It was not, therefore, an act to compel the town to create a debt, and levy a tax against its consent. It was, on the contrary, an act to give effect to an *imperfectly expressed consent* of the people.

To say that because the legislature passed an act to cure certain irregularities in the manner of calling and holding an election, it therefore created a debt and "compelled taxation without the consent of the people," is simply to beg the whole question. It is to deny the power of the legislature to pass retrospective statutes in any case, when the subject matter is the irregular or defective execution of a power by municipalities. And yet in the long list of our curative statutes it will be found that a great majority are similar to the act we are considering, and which counsel for plaintiff in error claim is null and void, on the ground that it creates a debt.

They say the election was a nullity, and so the Act of April 17th creates a debt. Was it a nullity as to a *bona fide* purchaser who found the bonds on the market, with recitals on their face that they were executed pursuant to a vote of the people at an election *held in accordance with the statute*, and who also found an existing act of the legislature passed long prior to the date of the bonds, and under which they might have been rightfully issued? We can only repeat, that the construction contended for is strained and unnatural. The act of April 17th was not an act to confer power, nor to impose a debt, but was simply an act to cure the defective execution of an existing power.

We will only, in this connection, refer the court to one other case, decided by the Supreme Court of Illinois, which, we submit, goes further, and is much stronger than the one at bar. We refer to the case of *The President and Trustees of the Town of Keithsburg* v. *Frick*, 34 Ill., 405.

The points decided are so well summarized in the head notes, that we will, as a matter of convenience, first quote such of them as are pertinent to the present case:

"3. It is competent for the legislature to bestow the power directly upon the town to subscribe for and take stock in a railroad, without requiring the subject to be submitted to a vote of the people.

"5. It seems that, even if a town subscribes to the stock of a railroad, and issues its bonds therefor, *without authority to do so*, still it is competent for the legislature to legalize and declare valid what the town may have done in that regard.

"6. So the subscription in this case by the town of Keithsburg is good, either under the special charter of 1857, as an original subscription under the second section, or as a subscription under the general law of 1849, (which conferred no authority to subscribe for stock,) confirmed, as it is, by the act of 1857."

The town of Keithsburg was organized under the general incorporation law of 1849, which confers no authority on towns, either to take stock in a railroad company, or to vote on that question. The town, nevertheless, went on and held an election, and voted to take stock to the amount of $20,000, and to issue bonds for that amount.

Subsequent to the election the town organized under a special charter passed by the legislature, the 17th section of which is as follows:

"The subscription heretofore made by said corporation to the capital stock of the Warsaw and Rockford Railroad Company of a sum not exceeding $20,000, to be paid for in town bonds to run for twenty years, at an interest not exceeding ten per cent., *is hereby legalized and confirmed to the full extent and for the purpose for which such subscription was made*; and the president of the corporation is hereby fully authorized and empowered to execute and issue said bonds under his hand and the corporate seal of said town, * * * * and whenever said bonds shall be issued, a lien is hereby declared to be created against all the real estate within the bounds of said corporation."

Under the authority of this curative act, the bonds were issued by the president of the board of trustees, each bond having printed on its back the validating clause The Supreme Court of Illinois held the bonds valid. And Chief Justice **Breese** adds: "It is by no means necessary in

"these subscriptions that there should be a vote of the in-
"habitants of the town or city authorizing them. * * *
"No bonds were in fact issued until after the passage of
"the act of 1857." In the case at bar, the bonds were not issued until ten days after the curative act.

In the case just cited there was absolutely no authority of law for the town to hold an election or to take stock in a railroad company, at the time the election was held, whereas in the case at bar there was, on the 16th day of March, when the election was held, an existing valid law allowing the town of Elmwood to subscribe for and take additional stock to the amount of $40,000.

But that it is competent for the legislature to retrospectively give effect and validity to an election of this character, *held before the passage of a law providing for such election*, has been expressly adjudicated by this court.

The case of *St. Joseph Township* v. *Rogers*, 16 Wall., 644, is familiar to the court, and is decisive of this question. We quote so much of it as is necessary to show the point decided.

Rogers brought assumpsit in the court below against St. Joseph Township to recover interest on certain railroad bonds alleged to have been issued by said township. The township set up that the bonds were not properly issued, and were void.

The case was thus :

On the 28th of February, 1867, the legislature of Illinois passed "An Act to amend the articles of association of the
"Danville, Urbana, Bloomington and Pekin Railroad Com-
"pany, and to extend the powers of, and confer a charter
"upon the same." In its material parts the act reads as follows :

"SECTION 12. To further aid in the construction of said road by said company, any incorporated town or township along the route of said road may subscribe to the capital stock of said company in any sum not exceeding $250,000.

"SECTION 13. No subscription shall be made until the question has been submitted to the legal voters of such town or township in which the subscription is proposed to be made. And the clerk of each of said towns or townships is hereby required upon the presentation of a petition signed by at least ten citizens who are legal voters, to post up notices for thirty days &c., notifying the legal voters of such town or township to meet at the usual place of holding elections in such town or township for the purpose of voting for or against such subscription. *Provided, that where elections have already been held*, and a majority of the legal voters of any township * * * were in favor of a subscription to said railroad, then and in that case no other election need be had; and the amount so voted for shall be subscribed, as in this act provided; *and such elections are hereby declared to be legal and valid as though this act had been in force at the time thereof, and all provisions hereof had been complied with.*

"SECTION 14. If it shall appear that a majority of all the legal voters of such towns or townships voting at such election have voted 'For subscription' it shall be the duty of the * * * supervisor in townships to subscribe to the capital stock of said railroad company in the name of such town or township to the amount so voted or subscribed, and to receive from said company the proper certificates therefor. He shall also execute to said company in the name of such town or townships bonds bearing interest at ten per cent. per annum, &c.

SECTION 15 provides, "that where elections may have already been held as aforesaid, it shall be the duty of the town clerks to file with the county clerks of their respective counties, within ten days after the issuing of said bonds, certificates of the votes of their towns, the amount of stock voted to be subscribed, the amount of bonds issued, and the rate of interest payable therein." (Session Laws State of Illinois 1867, vol. 2, page 758.)

On the 25th of February, 1869, the legislature passed an act as follows:

"Whereas, certain township officers along the line and through which the Danville, Urbana, Bloomington and Pekin Railroad passes, have failed to keep a full and perfect record of elections called and held, and township clerks have failed to file with the county clerk, certificates as required by section 15 of the amended articles of association of said railroad, therefore, "SECTION 1. Be it enacted that where such informalities and neglect may have occurred, and bonds have been issued to aid in the construction of said railroad, that no such neglect or omission on the part of township officers shall in any way invalidate or impair the collection of said bonds, both principal and interest, as they may respectively fall due," &c.

On the trial the plaintiff gave in evidence bonds in the usual form dated October 1st, 1867, signed by the supervisor and town clerk, purporting that the township acknowledged itself to owe so much money, which it promised to pay to the bearer with interest at ten per cent. per annum on the 1st day of October.

Each bond recited that it "was issued by virtue of a "law of the State of Illinois entitled, 'An act to amend "'the articles of the Danville, Urbana, Bloomington and "'Pekin Railroad Company, and to extend the powers of "'and confer a charter upon the same,' approved February "28th, 1867, and in accordance with the vote of the "electors of said township at the special election held "August fourteenth, 1866, in accordance with the provis-"ions of said act."

Evidence was given by the township tending to show that the election was held on the fourth day of August, 1866, *before the passage of the act of February* 28, 1867, *incorporating the company;* that at the time of the election there were three hundred legal voters in St. Joseph township, of whom only seventy-five voted at the election; that of the seventy-five only a majority voted in favor of issuing the bonds; that no poll book or record of any kind was made or kept of the election, and that no record or transcript of any kind was ever transmitted to the county clerk. (See statement of facts in 16 Wall., page 648).

The court below gave these instructions:

"1st. The election held in August, 1866, was validated "by the act of February 28th, 1867, so as to authorize the "defendant to subscribe for stock in the Danville, Urbana,

" Bloomington and Pekin Railroad Company, and to issue " the bonds in question; and when the stock was subscribed, and the bonds issued, the bonds are binding on " the defendant in the hands of a *bona fide* holder.

" 2nd. The recitals in the bonds estop the defendant " from denying the fact of a valid election, as against a " *bona fide* holder of the bonds or coupons attached " thereto."

In delivering the unanimous opinion of this court, Mr. Justice CLIFFORD says: " Objection is made to the preliminary proceedings because *the election approving the* " *subscription was held before the act was passed giving* " *such authority to such municipalities;* but two answers " are made to that objection, either of which is decisive:

" 1st. By the act conferring that authority, it is provided that when elections may have already been held, " and a majority of the legal voters of the township were " in favor of a subscription to said railroad, then and in " that case no other election need be had, and the amount " so voted for shall be subscribed as in the act is provided; " and the provision is that such elections are legal and " valid as if the act had been in force at the time thereof, " and that all the provisions had been fulfilled.

" 2nd. Because the legislature passed a subsequent act " declaring such subscriptions legal and obligatory. Some " of the township officers, it seems, failed to keep a full " and perfect record of elections called and held to " authorize such subscriptions, and that the clerks of the " townships failed in some instances to file the necessary " certificate with the county clerk, as required by the " fifteenth section of the prior act. Omissions and defects " of this kind becoming known, the legislature, on the 25th " day of February, 1869, enacted that where such informalities and defects may have occurred, and bonds have " been issued, or may hereafter be issued to aid in the " construction of such railroad, that no such neglect or

" omission shall in any way invalidate or impair the collec- " tion of said bonds, principal or interest, as they may " respectively fall due, and that all assessments that are " now made for the payment of the principal or interest, " are hereby legalized, &c.

" Two instructions were given by the court to the jury, " to which the defendants excepted." After quoting the instructions set out above, Mr. Justice Clifford continues: " Repeated decisions of the State courts have established " the rule that the Legislature has the constitutional right " to authorize municipal corporations to subscribe for the " stock of a railroad company, and to issue their bonds to " aid in the construction of such an intended improvement; " that the supervisors of the municipality have the power " in case such a subscription is authorized, to subscribe for " the stock of the company, and to call an election to as- " certain the will of the voters in that behalf. * * * *Ar- " gument to show that defective subscriptions of the kind " may in all cases be ratified where the Legislature could have " originally conferred the power,* is certainly unnecessary, " as the question is authoritatively settled by the Supreme " Court of the State, and of this court, in repeated in- " stances.

" Suppose that is so, still it is insisted by the defendants " that the election held to ascertain whether the legal " voters of the township would authorize the subscription, " was irregular and a nullity; (1). Because a majority of " the legal voters of the township did not vote at the meet- " ing notified and held for that purpose. (2). Because the " meeting *was notified and held before the act was passed " providing for such an election.*"

After overruling the 1st objection, Justice Clifford continues: " Sufficient has already been remarked to show " that the second objection cannot avail the defendants. * " * * Mistakes and irregularities are of frequent oc- " currence in municipal elections, and the State Legislatures "have often had occasion to pass laws to obviate such "difficulties. Such laws, *when they do not impair any con-* "*tract, or injuriously affect the rights of third persons, are* "*never regarded* as objectionable, and certainly are within "the competency of the legislative authority."

We have quoted somewhat largely from the foregoing case, as containing a better answer to the objections urged against the validity of the bonds now in suit than anything we could say. We submit that the case there made against the bonds was much stronger than the one at bar.

There was not only no law authorizing the call and notice for an election, at the time of such call and notice, but also none at the time the election was held. And there was seeming force in the consideration urged that the voters might ignore an election, for the holding of which there was no authority of law. But the Supreme Court of the United States settles the question by placing it upon the double ground that where an election has been actually held, it is competent for the Legislature to validate it by a curative act, and also to authorize a municipality to issue its bonds in aid of a railroad, without a vote of the people.

The case just quo ed is decisive of the case at bar, and we might well stop here.

We wish, however, to refer to a single other case, and it is one strongly in point.

McMillan et al., v. *Lee Co. and Boyles Co. Judge*, 3 Iowa, 317.

The electors had voted aid to certain railroads. On account of the election being unauthorized by any existing law, the Supreme Court declared the proceedings void.

After bonds were issued and sold, under the election, the Legislature of Iowa passed a curative act, legalizing said election and vote, under which the officers were proceeding to collect taxes; whereupon a second bill was filed to enjoin the collection of the tax, alleging that the act was unconstitutional and void.

This presents a stronger case of curative legislation than the one at bar. There the subscription had been made and the bonds issued before the legalizing act was passed; while in our case the bonds had not been issued nor the subscription made until after the curative act was passed. The act of April 17th legalized the election and declared that the *subscription when made* should be valid.

The Supreme Court of Iowa say: "The power having "been conferred, then, can the general assembly cure any "defects in the execution of it? Upon this question we "cannot entertain a doubt."

But it will be urged that the Supreme Court of Illinois has adjudged the act of April 17th invalid. And doubtless much stress will be laid upon that decision in the argument in this court, as there was also in the court below.

In reference to this decision we remark, preliminarily, (1). It was not a suit brought by a bondholder to recover on the bonds or coupons, but was a bill filed in the State court by certain tax payers against the collector, to restrain the collection of taxes. The bondholders were not made parties, and had no notice of the suit. As to them it was wholly an *ex parte* proceeding, between certain persons who were constituent parts of the corporation debtor. (2). The decision is not in harmony with the great current of authorities, and is in conflict with other decisions of the court which rendered it. It is squarely in conflict with the decisions of this court, and comes directly within the case of *Township of Pine Grove v. Talcott*, 16 Wall., 666; where the rule is wisely established that the decisions of the State tribunals will not be followed by this court, when such decisions are not satisfactory to the minds of the judges here, and when the matters in question are bonds issued in negotiable form by a municipality, and have passed into the hands of the citizens of another State *bona fide*, and for value paid.

We remark further, that when the decision was made, the ruling in the case of *St. Joseph Township v. Rogers* had not been promulgated. With that case before them, we cannot doubt that the validity of these bonds would have been sustained.

The case as decided by the State court is *Wiley* v. *Silliman*, 62 Ill., 170, in which a brief opinion is given by Mr. Justice Lawrence, but he refers to his more elaborate opinion in the case of *Marshall v. Silliman*, 61 Ill., 218, based upon the same substantial facts.

The Court arrived at the conclusion that the curative act of April 17th, 1869, as to the additional $40,000, was the *creation of a debt* by the legislature, and therefore a violation of the Constitution.

In delivering the opinion of the Court, Judge Lawrence says: " Our conclusion is, that the so-called curative act " was a violation of the Constitution. Its object was, to " compel this town to issue its bonds for railroad stock, in- " dependently of its own wishes, and this was beyond the " limits of its legislative power. It sought to accomplish " this by declaring that a void proceeding was a valid one; " that a vote confessedly illegal was in fact legal. * * " And when the legislature undertook to say that this vote " created a valid obligation against the town, when it did " not, was attempting by its own act to create a corporate " debt," &c.

How *create* a corporate debt? The language of the act is: " That a certain election, held in the township of " Elmwood, Peoria county, on the 16th day of March, " 1869, at which a majority of the legal voters in said town- " ship, in special town meeting, voted to subscribe for and " take $40,000 of the capital stock of the Dixon, Peoria " and Hannibal Railroad Company, over and above the " $35,000 which was on the same day subscribed for and "taken in accordance with the charter of said company, "is hereby legalized and confirmed, and is declared to be "binding on said township; and the said $40,000, when "subscribed according to the conditions of said vote, may "be collected from said township in the same manner as if "the said subscription had been made under the provisions "of said charter."

Did this statute create a corporate debt because of the words "*and is hereby declared binding on said township,* "*and said* $40,000 *when subscribed according to the conditions of said vote, may be collected from said township in the* "*same manner as if the said subscription had been made un*"*der the provisions of said charter.*"

If it did, let us strike out those words. If the Court was right in holding that those words create a debt, and so are obnoxious to the provisions of the Constitution, we must discard them. It is a familiar principle in the construction of statutes, that a statute is void only so far as its provisions are repugnant to the Constitution, and that one provision may be void, and this not affect other provisions.

Sedgwick, on the Construction of Statutes and Constitional Law, 2 ed., 413.

"The principle is now well understood, says the Supreme "Court of Massachusetts, that where a statute has been "passed by the legislature under all the forms and sanc"tions requisite to the making of laws, some part of which "is not within the conformity of the legislative power, or "is repugnant to any provision of the Constitution, such "part thereof will be adjudged void and of no avail, whilst "all other parts of the act not obnoxious to the same ob"jection, will be held valid, and have the force of law."

Fisher v. *McGin*, 1 Gray, 22.

Striking out, then, those words of the act, it stands thus: "That a certain election, held in the township of Elmwood, "on the 16th day of March, 1869, at which a majority of the "legal voters in said township, in special town meeting, "voted to subscribe and take $40,000 of the capital stock "of, &c., over and above the $35,000, which was on the "same day subscribed for and taken in accordance with "the charter of said company, is hereby legalized and con"firmed."

What is this but an ordinary statute, to cure irregularities in a previous election? To say that it creates a debt, is simply to beg the question. Not a confirmatory act was ever passed of which the same might not be said. In a certain sense, every curative or confirmatory act may be said to give validity to what would otherwise be invalid. Indeed, the objects of such statutes is to cure defects in former statutes, or to cure irregular or defective proceedings under them; and hence to assert that a curative statute creates a debt, is to assume the entire question in dispute. In making this assumption the court jumped at a conclusion, overlooking the fact that by its own decisions it had repeatedly sustained analogous legislation. It overlooked the fact that there was an existing law in force at the time the election was held, under which the town of Elmwood was authorized to subscribe for the additional $40,000, and that *by virtue* of that law, as well as the act of April 17th, the town made the subscription, and issued its bonds. The people of the town, at a full election, voted by a large majority to make the subscription, and the proper officers, pursuant to that vote, subscribed for the stock. There were irregularities in the mode of calling the election, and giving the notice. The legislature passed an act to cure them. The bonds were issued and sold by the town. Is it not sticking in the bark to assert in the face of these facts, that the act of April 17th *created* a debt? It is the act of the town, and not the act of the legislature, that created the debt.

When the former decision of the Court in the case of the *President and Trustees of Keithsburgh* v. *Frick*, in which the Court had upheld a confirmatory statute, precisely like the present, was called to the notice of the Court, they undertook to escape, we say it respectfully, by a quibble. The Court had there decided that if a town subscribed to the stock of a railroad, without authority to do so, it is competent for the legislature to legalize and declare valid what the town may have done in that regard.

The Court attempt to break the force of that decision by saying: "It is said, however, by counsel for the appellee, "that the legislature might have authorized the town supervisor and town clerk, as the corporate authorities of the "town, to subscribe to the stock of this road, and issue "township bonds therefor, without a vote of the people, "and that the curative act is to be considered as giving "them that power, which they have duly exercised. The "case of the *Town of Keithsburg* v. *Frick*, 34 Ill., 420, is "cited in support of this position."

"It was said, in that case, that the legislature might "grant that power to the trustees of a town, if it thought "proper to do so, without taking a vote of the people. "We do not dissent from that position, but it does not aid "the appellee in the present case. The town supervisor "and clerk, who issued these bonds, do not represent "a township as the board of trustees represent a town, "or the common council represent a city. The supervisor and town clerk are but a part of the corporate "authorities. The case of *Livingston* v. *Wider*, *supra*, "may be again cited. We said there that the police "commissioners were not the corporate authorities of "East St. Louis, as they had not been elected by the "people of the city, nor appointed in any manner to which "the people had given their consent, and therefore, the "legislature could not give them the power of taxation, "by creating a debt binding upon the city."

It will be observed that Judge LAWRENCE does not point out *who are* the "municipal authorities" of a town.

Now, the township organization law of Illinois nowhere declares what officers of a town constitute its municipal authorities.

Article IV, § 1, Revised Statutes, 1874, page 1,071, provides as follows:

"The corporate name of each town shall be the town of, (name of town), and all acts done by the town, and actions by or against the town, shall be in its corporate name."

Article V, § 2, page 1,073, provides:

"In all suits or proceedings, the town shall be sued by its name, except where the town officers shall be authorized by law to sue in their name of office, for the benefit of the town."

Article VII, § 1, page 1,075, provides:

"At the annual town meeting in each town, there shall be elected, by ballot, one supervisor, (who shall be *ex-officio* overseer of the poor); one town clerk; one assessor, and one collector, who shall severally hold their offices for one year, and until their successors are elected and qualified, and such justices of the peace, constables, and highway commissioners, as provided by law."

And in § 3, Article IV, page 1,072, provision is made for the election, at town meetings, of pound masters, etc.

But the statute does not declare which of these officers constitute the municipal authorities, nor that all of them shall.

Now, suppose the act of April 17th, instead of being an act to cure irregularities in a prior election, had simply provided that the town of Elmwood might subscribe for $40,000 additional stock, and issue bonds in payment therefor, without any vote of the people. Such an act, Judge LAWRENCE concedes, would be within the competency of the legislature. Suppose, also, the act should be silent as to who should subscribe for the stock and issue the bonds: will the counsel for the plaintiff in error inform us, as the State Court did not, by whom the stock should be subscribed, and the bonds signed, in order to bring them within the category of bonds issued by the "corporate "authorities?" Should they be signed by the supervisor, town clerk, and two justices of the peace? But there are other town officers. Let us then add the constables and three highway commissioners. Still the list is incomplete, for there is also the assessor, and the collector, not to mention the pound masters, path masters, etc. If we are answered that the bonds must be signed by all these various officers, in order to be executed by the "corporate authorities," our reply is, (1), that the statute has not so provided; (2), that such a construction seems to us strained, and unreasonable.

We submit, that a more natural interpretation of our township law is, that the supervisor, as the executive head and chief officer of the town, together with the town clerk, as the secretary and keeper of its records, are the proper officers to execute all authorized town obligations, except such as are otherwise specifically provided for; and that, *pro hac vice*, they are the municipal authorities of the town.

In *Marcy* v. *Town of Ohio*, 5 Legal News, 551, Judge DRUMMOND says: "The bonds, in point of fact, were, "in this instance, issued by the supervisor and town clerk, "and the question is, whether this is within the clause of "the amendment; and it may be a question who are the "corporate authorities within the meaning of this law. "* * * After some hesitation, I have come to the con"clusion that the supervisor and town clerk are, within "the meaning of this law, the corporate authorities."

And such has been the practical construction universally put upon the law, from the time of its adoption to the present time. In all the numerous railroad and town bonds that have come under our observation, not one has been executed other than by the supervisor and town clerk alone. And yet the enabling acts rarely ever specify by what officers the bonds are to be executed, but contain only a general provision that the town may issue its bonds. The charter of the Danville, Urbana, Bloomington and Pekin Railroad Company is exceptional in that regard.

The distinction, therefore, made by Judge LAWRENCE, between the case of the *Town of Keithsburg* v. *Frick*, and the case at bar, seems to us too technical to be satisfactory. The cases cited by him, in support of his position, were all cases in which the legislature attempted to confer the power to create a corporate debt upon persons wholly outside the corporate authorities; such, for instance, as park commissioners, bridge commissioners, and the like.

Howard v. *The St. Clair and Monroe Drainage Co.*, 51 Ills., 30.
Hessler v. *Drainage Co.*, 53 Ills., 110.
Livingston v. *Wider*, *Ib.*, 302.

But again, the act of April 17th, 1869, provides: "that "the stock when subscribed for and taken *in accordance* "*with the provisions of the charter*, shall be binding," &c. The provisions of the charter were, that a vote of the people should be taken, and (§ 14) "if it shall appear that a "majority of all the legal voters of the town or township "voting at such election have voted 'for subscription,' it "shall be the duty of the supervisor to subscribe to the "capital stock of said railroad company, in the name of "such town or township, the amount so voted to be sub-"scribed, and to receive from said company the proper cer-"tificates therefor. He shall also execute to said company, "in the name of such town or township, bonds, &c., * " * * and which bonds shall *be signed by such supervi-*"*sor, and be attested by the clerk of the town or township*," &c.

Now the intention, and the effect, of the act of March 9th, amending the charter, was simply and only to increase the amount which the town might subscribe, from $35,000 to any amount not exceeding $100,000. No change was made in the manner of making the subscription or issuing the stock. It was to be done by the supervisor and town clerk. The subscription for the $40,000, and the bonds issued therefor, were made by the supervisor and town clerk in exact accordance with the requirements of the charter, and in the precise manner that the subscription for the $35,000, which the court held valid, was made. In both cases, the question whether the town would make the subscription was submitted to a vote of the people under existing laws authorizing a vote ; in both cases there was a large majority, exactly the same majority "for subscription," and in both, the supervisor and town clerk canvassed this vote, made the subscription, and issued the bonds. As to the supervisor and town clerk, their action was identical in both cases. The subscription was made, to quote the language of the act of April 17th, "according "to the conditions of said vote," and in accordance with the conditions of said charter. The court decided that the subscription for $35,000 was made in accordance with the charter and was valid. The only difference between the two cases is, that there was an irregularity in the manner of calling the election for the $40,000, and only seven days intervened between the passage of the act authorizing it and the holding of the election.

Ten days before the bonds were issued, and a month after the election was held, the legislature pass an act reciting the holding of the election, legalizing and confirming it, and declaring that "the said $40,000, when subscribed ac- "cording to the condition of said vote, shall be valid." To say that such an act of the legislature was, in any proper sense, the "creation of a debt," is a proposition warranted neither by reason nor authority. Both the court, when deciding, and the counsel, when arguing the case, seemed to have overlooked the distinction between the existence of a power and the regularity of its exercise. For, look at the case from whatever standpoint you may, the stubborn fact still comes into view, that before the bonds were issued, and when the election was held, the act of March 9th was in force, and it authorized a subscription for $40,000. *All the rest was only an irregular execution of the authority; and that the legislature may cure, and did cure.*

But turning from the case of *Marshall* v. *Silliman*, it is sufficient to say that it is in direct conflict with the decision of this court in the case of *St. Joseph Township* v. *Rogers*, 16 Wall., quoted above. And your Honors will notice, by reference to page 653 of the report of that case in 16 Wall., that the counsel for the plaintiff in error cited in argument this very case of *Marshall* v. *Silliman*, insisting that the Supreme Court of Illinois had given a judicial construction to a statute entirely similar to the one then under review, holding it invalid. So that the case in 16th Wallace was decided by this court, with the case of *Marshall* v. *Silliman* before it.

If, then, as was held in *St. Joseph Township* v. *Rogers*, it is competent for the legislature to validate and give effect to an election held before the passage of the law authorizing an election, how much stronger is the case where there is a law in force at the time of holding the election, and there was only a defective notice as to the time and manner of calling the election.

Upon the authority of the St. Joseph case we rest securely. The principles there enunciated cover the entire ground of the case at bar, and we could not excuse ourselves for troubling the court with the citation of further authorities.

The decision in the Silliman case was made in a proceeding between original parties, and not in the case of suit brought by an innocent holder of the bonds. As against the rights of the latter, the decision is opposed by the long line of adjudications in this court. The present is not a case of want of power; and no ingenuity of argument can make it so. It is plainly a case of an irregular exercise of power, and it is only that. The act of March 9th authorizing the town to subscribe $40,000 in addition to the $35,000 was in force when the election was held, and when the bonds were issued. The bonds contain full recitals upon their face that they were issued in accordance with the statute, and pursuant to a vote of the electors, at an election held in accordance with the statute.

IV.

In Conclusion.

Fortunately for the vast and constantly increasing interests of commerce, and for the protection of commercial securities, the Constitution of the United States made provision for a tribunal which should always be removed from the arena of local excitements and popular clamor when engaged in the administration of justice. In the case of *Township of Pine Grove v. Talcott*, 19th Wall., 677, this court said: "It is insisted that the invalidity of the statute "has been determined by two judgments of the Supreme "Court of Michigan, and that we are bound to follow "those adjudications. We have examined those cases "with care. With all respect for the eminent tribunal by "which the judgments were pronounced, we must be per-"mitted to say they are not satisfactory to our minds. We "think the dissenting opinion in the one first decided is unan-"swered. Similar laws have been passed in twenty-one "States. It is not easy to resist such a current of author-"ity. The question before us belongs to the domain of "general jurisprudence. In this class of cases this court is "not bound by the judgments of the courts of the States "where the cases arise. Here commercial securities are "involved. When the bonds were issued, there had been "no intimation from any quarter that such statutes were "invalid. The legislature affirmed their validity in every "act by an implication equivalent in effect to an express "declaration. * * * Were we to yield in cases like "this, to the authority of the decisions of the courts of the "respective States, we should abdicate the performance of "one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the constitution, in providing for "the creation of an independent Federal judiciary."

We think it would be difficult to find a case in which the principle here enunciated has a more fitting application than the case at bar. The simple question is, did the act of April 17th create a debt, to use the language of the court, in the Silliman case? Was that the intention of the legislature in adopting it, or was it merely intended to cure an irregularity in the holding of an election under a statute which confessedly gave the town power to hold it? The answers given to these questions by the Supreme Court of Illinois cannot, we are confident, be satisfactory to this court.

The learned counsel for the plaintiff in error, made an appeal to the court below, which perhaps may be repeated here, urging their Honors to rescue his clients from a debt which they had been beguiled into contracting. As a rhetorical flourish it was certainly very creditable. But the difficulty underlying the case, and which tends to break the force of the[illegible] appeal, is that the defence is essentially dishonest. A sparsely settled town, remote from railroad facilities for the transportation of its products, induces the projectors of a new road to locate their line through its territory, by the offer to take stock, giving its bonds in payment. The bonds are issued, and sold to innocent parties. The road is built, and lands in the locality are doubled or trebled in value. And then, when asked by a purchaser for payment of its obligations, the town comes into court, and, without even so much as offering to return the stock received for its obligations, tries to repudiate them upon the merest technicality. Such is the morality of the present defence. Similar conduct in an individual would be dishonorable. It ought to be so held in a municipal corporation.

It is perhaps not improper to state that the circuit and district judges who tried the case were both of opinion that the plaintiff was entitled to recover, but being willing that the defendant should take the case to this court, upon a certificate of division, if under the act of Congress he is entitled to do so, a certificate was signed *pro forma*, and the record was made up as it now appears on file.

ISAAC G. WILSON, and
SANFORD B. PERRY,
Counsel for Defendant in Error.